

Bertulis-Fernandes, J – Writing Sample

harass and pressure him, going so far as to approach him a second time and some forty-five minutes after Mr. Varnsen had first refused to sell him marijuana. *Id.* ¶¶ 8–12. Mr. Varnsen’s repeated refusals to use Detective Landry’s solicitations as an opportunity to sell him marijuana show that he was not inclined to sell Detective Landry marijuana and only agreed to do so following sustained pressure by him. *Id.* ¶¶ 8–19; *see Johnson*, 511 N.W. 2d at 755–56.

Mr. Varnsen did not initiate any of the interactions with Detective Landry, all of which Detective Landry himself continued to lead despite Mr. Varnsen’s refusal to engage with him. *Stip.* ¶¶ 8–12. In *State v. Lombida*, the Government did not induce a man to sell cocaine when he voluntarily met with a police officer on multiple occasions with the express purpose of selling illegal drugs. *See* No. A11–537, 2012 WL 1380264, at *1–3 (Minn. Ct. App. Apr. 23, 2012). Similarly, in *State v. Bauer*, the Government did not induce the defendant to commit the charged offense as the defendant themselves initiated the sale of ecstasy. *See* 776 N.W.2d 462, 470–471 (Minn. Ct. App. 2009). Unlike in *Lombida* and *Bauer*, Mr. Varnsen did not initiate the sale of marijuana nor did he enter into any of the interactions with Detective Landry with the purpose of selling him marijuana. *Stip.* ¶¶ 8–19; *see Lombida*, 2012 WL 1380264, at *3; *Bauer*, 776 N.W.2d at 470–471. By contrast, the exchange of marijuana was solely solicited by Detective Landry and occurred even though Mr. Varnsen repeatedly refused to sell him marijuana. *Stip.* ¶¶ 8–19. The marijuana sale originated solely with Detective Landry and Mr. Varnsen would not have committed the crime without his pressure. *Id.*; *see Johnson*, 511 N.W. 2d at 755–56.

B. Mr. Varnsen Was Not Predisposed to Commit the Charged Offense.

Additionally, the Government has failed to meet its burden and has not shown beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the offense of selling marijuana before interacting with Detective Landry. *See Stip.* ¶¶ 8–19; *Johnson*, 511 N.W. 2d at 755–56.

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When considering whether or not a defendant was predisposed to commit the charged offense before interaction with a government actor, courts consider evidence related to several factors, including: prior criminal activity and criminal reputation together with other factors that may suggest criminal predisposition such as circumstantial evidence or whether the defendant readily accepted the government's solicitation. *See In re Welfare of G.D.*, 473 N.W. 2d 878, 883 (Minn. Ct. App 1991). The Government must also demonstrate that the defendant was predisposed to commit the crime before first being approached by government agents and cannot rely on the defendant's actions after being approached to show they were predisposed. *See Johnson*, 511 N.W. at 755.

When examining criminal activity, courts consider both prior criminal convictions and criminal activity not resulting in convictions. *In re Welfare of E.E.B.*, No. A08-0893, 2009 WL 1374313, at *3 (Minn. Ct. App. May 19, 2009). Past or current criminal involvement is only relevant if it suggests predisposition to commit the charged offense at the time that the Government solicited the commission of the crime, as opposed to demonstrating past or general criminal predisposition more broadly. *See Johnson*, 511 N.W. at 755. As a result, past involvement in criminal activity does not suggest predisposition to commit the charged offence if it does not show that this involvement is ongoing. *Id.* A defendant's criminal reputation, and whether they were known to have committed crimes or were otherwise engaged in criminal acts, can also be used by a court to find that they were predisposed to commit a crime. *See Potter*, 1998 WL 171346, at *3. Additionally, courts may also determine predisposition to commit certain crimes based on circumstantial evidence that suggests the defendant was involved in particular criminal activity. *See State v. White*, 332 N.W.2d 910, 912 (Minn. 1983). Finally, whether an individual readily and willingly accepted the government agent's solicitation can

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also be used to find that the defendant was predisposed to commit a crime. *See Olkon*, 299 N.W. 2d at 108 (holding that an attorney’s immediate willingness to assist a client in filing a fraudulent insurance claim show he was predisposed to commit insurance fraud).

The Government cannot show beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the charged offense because he does not have any criminal convictions that demonstrate an ongoing predisposition to commit the charged offense nor does he have a criminal reputation. Further, Mr. Varnsen did not readily accept Detective Landy’s solicitation and there is no circumstantial evidence that suggests that Mr. Varnsen was otherwise predisposed.

- a. *Mr. Varnsen’s prior convictions do not demonstrate an ongoing predisposition to sell marijuana and the Government cannot demonstrate that Mr. Varnsen has a criminal reputation.*

Mr. Varnsen’s prior convictions do not suggest he was predisposed to sell marijuana. *See Stip.* ¶ 3. As the court explained in *In re Welfare of E.E.B.* when it held that a defendant who regularly used cocaine was nonetheless not predisposed to sell it, merely using illegal drugs previously does not establish intent to sell illegal drugs. *See Stip.* ¶ 3; 2009 WL 1374313, at *2. As in *E.E.B.*, Mr. Varnsen’s prior illegal drug use (in this instance, a prior conviction for possession of marijuana) shows only that Mr. Varnsen used drugs some thirteen years ago and, most critically, does not establish an ongoing intent to sell illegal drugs. *See* 2009 WL 1374313, at *2. Further, Mr. Varnsen’s conviction for transferring stolen property is similarly entirely different, as a matter of law, to selling drugs and does not show a predisposition to commit the charged offense. *See Stip.* ¶ 3; *E.E.B.*, 2009 WL 1374313, at *2.

In any event, as the court reasoned in *Johnson* when it held that a man who had been convicted for drug trafficking twenty years previously was not predisposed to sell marijuana,

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past criminal activity does not show predisposition where there is no evidence this criminal involvement was ongoing. *See* 511 N.W. at 755. As in *Johnson*, Mr. Varnsen’s convictions for two offenses do not show any ongoing involvement with criminal activity. *See* Stip. ¶ 3; 511 N.W. 2d at 755. Courts have consistently held that the only relevant time period for determining whether an individual was predisposed to commit a charged offense is the time at which the government solicited the crime. *See Johnson*, 511 N.W. 2d at 755 (explaining how predisposition at “the time of solicitation . . . [is] the only relevant time”). The most recent of Mr. Varnsen’s prior criminal convictions occurred some twelve years ago when he was only nineteen years old. Stip. ¶ 3. These past criminal convictions do not establish that he was predisposed to sell marijuana because they do not show that his involvement in criminal activity was ongoing at the time that Detective Landry solicited the crime. Stip. ¶¶ 3-12; *see Johnson*, 511 N.W. 2d at 755.

Further, the Government does not successfully assert that Mr. Varnsen had a criminal reputation or was otherwise involved in selling marijuana prior to interacting with Detective Landry. Stip. ¶¶ 1-20; *see Potter*, 1998 WL 171346, at *3. The Government has not provided evidence that Mr. Varnsen was involved in any uncharged criminal activity or even that Mr. Varnsen was known to be involved in selling marijuana. Stip. ¶¶ 1-20; *see Grilli*, 230 N.W. 2d at 451. Indeed, Mr. Varnsen was entirely unknown to Detective Landry, who acted on general intelligence that marijuana was being sold nearby rather than that Mr. Varnsen himself was selling it. Stip. ¶¶ 5-7.

- b. *The Government cannot point to circumstantial evidence suggesting involvement in selling marijuana and Mr. Varnsen did not readily accept Detective Landry’s solicitation.*

No evidence asserted by the Government establishes, even circumstantially, that Mr. Varnsen was predisposed to sell marijuana. *Id.* ¶¶ 1-20; *see White*, 332 N.W.2d at 912. In *State*

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v. *White*, the court held that the Government had circumstantially proved the defendant's intent to sell drugs as the defendant was found with a large quantity of illegal drugs and packaging materials. *See* 332 N.W.2d at 912. By contrast, Mr. Varnsen was not found in possession of a large quantity of marijuana or with packaging materials or other paraphernalia that suggested he was involved in selling drugs. *Stip.* ¶¶ 1–20; *see White*, 332 N.W.2d at 912.

Further, Mr. Varnsen did not readily accept Detective Landry's solicitation: by contrast he steadfastly refused Detective Landry's approaches and repeatedly asserted that he was not involved or interested in selling marijuana. *Stip.* ¶¶ 1–20; *see Johnson*, 511 N.W. 2d at 755–56. Mr. Varnsen's responses to Detective Landry's repeated solicitations show that Mr. Varnsen's original inclination was not to commit the crime, even when given a clear opportunity to do so, and demonstrate that he was not predisposed to commit the charged offense. *Stip.* ¶¶ 1–20; *see Johnson*, 511 N.W. 2d at 755–56. Thus, even in the absence of relevant criminal convictions, the Government still fails to demonstrate that Mr. Varnsen was predisposed to sell marijuana prior to first interacting with Detective Landry. *See White*, 332 N.W.2d at 912.

CONCLUSION

Because law enforcement induced Mr. Varnsen to commit the charged offense and the Government has failed to show beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the crime, the Court must dismiss the complaint against the Defendant.

Respectfully submitted on behalf of
MICHAEL VARNSEN Defendant

Jonathan Bertulis-Fernandes, Esq.

DATE: 5/31/2022

Applicant Details

First Name	Anthony
Middle Initial	E
Last Name	Birong
Citizenship Status	U. S. Citizen
Email Address	abirong@lawnet.uci.edu
Address	<div> Address Street 5104 Palo Verde Rd. City Irvine State/Territory California Zip 92617 Country United States </div>
Contact Phone Number	562-370-6354

Applicant Education

BA/BS From	Norwich University
Date of BA/BS	September 2019
JD/LLB From	University of California, Irvine School of Law
	http://www.law.uci.edu
Date of JD/LLB	May 11, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	UC Irvine Law Review
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	Yes
--------------------------------------	------------

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Barron, Ben
Ben.Barron@usdoj.gov

Tonner, Grace
gtonner@law.uci.edu
(949) 824-4037

Leslie, Christopher
cleslie@law.uci.edu
949-824-5556

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Judge Walker:

I am a rising third-year law student at the University of California, Irvine School of Law (UCI Law), and I am applying for a clerkship in your chambers for the 2024–25 term. I am particularly interested in clerking in your chambers because of your extensive criminal law experience. I believe that my training at UCI Law, my externships with the Honorable Otis D. Wright II and the United States Attorney's Office, and my military experience will make me a valuable addition to your chambers.

Prior to law school, I served for six years on active duty in the United States Navy as a Special Warfare Boat Operator (SWCC). I held the roles of lead navigator and lead communicator. As lead navigator, I conducted thorough research, drafted detailed navigation plans, and frequently presented to senior officers. As lead communicator, I collaborated with various government agencies and acted as my team's liaison during dynamic military operations and exercises. Over the course of six years and two deployments, I received the Joint Special Achievement Medal and two Navy and Marine Corps Achievement Medals for outstanding performance of my duties. My attention to detail, eagerness to learn, and positive attitude allowed me to thrive in high-stress situations. I am a 100% Permanent and Total Disabled Veteran. I am confident that these experiences will make me a motivated, productive, and valued member of your chambers.

My education, legal experiences, and my strong legal research and writing skills will help me succeed as your clerk. In my first year at UCI Law, I received the second-highest grade in Lawyering Skills, the legal research and writing course at UCI Law. Last summer, I externed for the Honorable Otis D. Wright II. I was exposed to a wide range of criminal and civil cases, and I learned how judges and clerks balance judicial efficiency and justice. As an extern for the United States Attorney's Office last fall, I researched criminal statutes and criminal procedure and helped Assistant United States Attorneys draft indictment memos, pretrial motions, sentencing positions, and appellate briefs. I will be returning to the office this fall as a certified law student, where I will make appearances before magistrate judges and first chair misdemeanor trials. As a research assistant to Professor Christopher Leslie, I have extensively researched antitrust law, civil procedure, and banking practices. As a research fellow for Professor Grace Tonner, I provide verbal and written feedback to first-year law students. I have received pro bono awards for my volunteer legal services at the Veterans Legal Institute, Community Legal Aid SoCal, and the United States Marine Corps Camp Pendleton Legal Assistance Office. Finally, I am a member of the *UC Irvine Law Review*.

I hope to translate my experiences and credentials into a successful tenure as your clerk. Enclosed you will find my resume, a writing sample, my academic transcripts, and letters of recommendation from Professor Christopher Leslie, Professor Grace Tonner, and Assistant United States Attorney Ben Barron. Thank you for your consideration.

Very Respectfully,


Anthony Birong

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

EDUCATION

University of California, Irvine, School of Law, Irvine, CA

Juris Doctor expected May 2024, GPA: 3.45

Activities: *UC Irvine Law Review*, Associate Editor
Veterans Law Society, Co-Founder & Secretary
Criminal Law Society, Board Member
Lawyering Skills Research Fellow for Professor Grace Tonner

Pro Bono: United States Marine Corps Camp Pendleton Legal Assistance Office
Veterans Legal Institute
Community Legal Aid SoCal

Norwich University, Northfield, VT

Bachelor of Science in Criminal Justice, *summa cum laude*, September 2019, GPA: 3.92

LEGAL EXPERIENCE

United States Attorney's Office, Santa Ana, CA

Expected August – December 2023

Certified Law Student

Morgan, Lewis & Bockius LLP, Costa Mesa, CA

May – July 2023

Summer Associate

University of California, Irvine School of Law, Irvine, CA

May 2022 – Present

Research Assistant to Professor Christopher Leslie. Work closely with professor to research antitrust law and banking practices. Present factual and legal findings to professor. Provide analysis and recommendations on draft law review articles.

United States Attorney's Office, Santa Ana, CA

August – December 2022

Criminal Division Extern. Reviewed police reports, investigation reports, criminal records, and police body camera footage. Observed execution of search warrants, proffers, reverse proffers, and jury trials. Assisted federal law enforcement officers and Assistant United States Attorneys draft search warrants, indictment memos, pretrial motions, sentencing positions, and appellate briefs.

United States District Court, Central District of California, Los Angeles, CA

May – August 2022

Judicial Extern to the Honorable Otis D. Wright II. Analyzed, researched, and briefed matters filed with court. Reviewed and edited orders and opinions. Researched, prepared, and drafted memoranda, orders, and opinions addressing state and federal law, commercial disputes, and criminal law.

EMPLOYMENT

United States Navy Reserve, SEAL Team 17, Coronado, CA

July 2021 – July 2023

Special Warfare Boat Operator (SWCC). Maintain administrative and physical requirements necessary to deploy on an as-needed basis. Attend monthly requalification training necessary for special operations deployments including parachute, cold weather, and weapon proficiency training.

United States Navy, Special Boat Team 12, Coronado, CA

July 2015 – July 2021

Special Warfare Boat Operator (SWCC). Studied local geography and customs to plan special operations missions in support of Global War on Terrorism. Collaborated with military and government agencies. Drafted research documents and presented plans to senior military officials. Trained and instructed foreign military special operations groups on maritime special operations tactics and counterterrorism.

SKILLS AND INTERESTS

Certified SCUBA diver. Licensed skydiver. Interests include hiking, traveling, and golfing.

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Unofficial Transcript

[\(Print This Page\)](#)

Birong, Anthony E. (40962858)

Birong, Anthony E. (40962858)
LAW (SCHOOL OF LAW)

Your transcript below is not official and is informational only. It is not for use as a verification of enrollment.

Official transcripts, verifications of enrollment, or other records may be requested from the University Registrar. Refer to the Services section on our website.

***** THIS IS NOT AN OFFICIAL TRANSCRIPT *****

Previous Degrees

B.S. 09/19 NORWICH UNIV

Memoranda

LAW 506A - DEANS AWARD - FALL 2021

PRO BONO - 50 HOUR AWARD - 2021-22

PRO BONO - ACHIEVEMENT (50+ HRS) - 2022-23

2021 Fall Semester

PROCEDURAL ANALYSIS	LAW	504	4.0	B	12.0	
LAWYERING SKILLS I	LAW	506A	3.0	A+	12.9	
LEGAL PROFESSION I	LAW	507	3.0	B-	8.1	
LEG RESEARCH PRAC	LAW	508	1.0	S	0.0	<u>SU</u>
COM LAW: CONTRACTS	LAW	500	4.0	A	16.0	

Term Totals **ATTM: 14.0** **PSSD: 14.0** **GPTS: 49.0** **GPA: 3.500**

Cumulative Totals **ATTM: 14.0** **PSSD: 14.0** **GPTS: 49.0** **GPA: 3.500**

2022 Spring Semester

COMMON LAW: TORTS	LAW	501	4.0	A	16.0	
STATUTORY ANALYSIS	LAW	503	3.0	B	9.0	
CON ANALYSIS	LAW	502	4.0	B-	10.8	
LAW SKILLS II	LAW	506B	3.0	A	12.0	
LEG & STAT INTERP.	LAW	580	2.0	B+	6.6	

Term Totals **ATTM: 16.0** **PSSD: 16.0** **GPTS: 54.4** **GPA: 3.400**

Cumulative Totals **ATTM: 30.0** **PSSD: 30.0** **GPTS: 103.4** **GPA: 3.447**

2022 Fall Semester

CRIMINAL PROCEDURE	LAW	513	3.0	A-	11.1	
EVIDENCE	LAW	514	3.0	A	12.0	
PART-TIME EXTRNSHIP	LAW	597PT	4.0	S	0.0	<u>SU</u>
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	<u>SU</u>
PART-TIME EXT SUM	LAW	597X	4.0	S	0.0	<u>SU</u>
LAW REVIEW	LAW	598R	1.0	S	0.0	<u>SU</u>

Term Totals **ATTM: 6.0** **PSSD: 6.0** **GPTS: 23.1** **GPA: 3.850**

Cumulative Totals **ATTM: 36.0** **PSSD: 36.0** **GPTS: 126.5** **GPA: 3.514**

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Unofficial Transcript

2023 Spring Semester

BUSINESS ASSOC	LAW	511	3.0	B+	9.9
PROPERTY	LAW	517	4.0	B+	13.2
REMEDIES	LAW	518	3.0	B	9.0
CRIM TRIAL ADVOCACY	LAW	5941	2.0	A-	7.4
RACE LAW CAPITALISM	LAW	5778	3.0	B+	9.9
RESEARCH FELLOW	LAW	298T	2.0	S	0.0

SU

Term Totals **ATTM: 15.0** **PSSD: 15.0** **GPTS: 49.4** **GPA: 3.293**

Cumulative Totals **ATTM: 51.0** **PSSD: 51.0** **GPTS: 175.9** **GPA: 3.449**

INCOMPLETE GRADES: 0 **UNITS:** 0.0
NR GRADES: 0 **UNITS:** 0.0
P/NP GRADES: 0 **UNITS:** 0.0
S/U GRADES: 6 **UNITS:** 14.0
W GRADES: 0 **UNITS:** 0.0

GRADE UNITS ATTEMPTED 51.0 **GRADE POINTS** 175.9 **UC GPA** 3.449
TOTAL UNITS PASSED 51.0 **UNITS COMPLETED** 65.0

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United States Department of Justice

United States Attorney's Office Central District of California

Benjamin R. Barron
Phone: (714) 338-3536
E-mail: Ben.Barron@usdoj.gov

Ronald Reagan Federal Bldg & U.S. Courthouse
411 West Fourth Street, Suite 8000
Santa Ana, California 92701

June 8, 2023

To whom it may concern,

I am writing to enthusiastically recommend Anthony Birong for a judicial clerkship in your chambers. Anthony served as a law school extern with my office during his Fall 2022 semester. He will be returning to my office as an extern this coming fall. Anthony stood out early into his externship. He sought out difficult assignments, produced excellent work, and was a pleasure to work with. His research memos and draft language for briefs were well organized, detailed, and hit all the salient points. Anthony met all deadlines and did a great job communicating progress.

Early into his externship, we felt comfortable trusting Anthony to take on important assignments. For example, Anthony provided research support and draft language for a Ninth Circuit brief on a novel issue of statutory construction. Anthony's analysis was thoughtful and comprehensive, and we used much of his draft language in the filed brief. As a further example, Anthony prepared a research memorandum addressing the anticipated trial defense in a murder case, and he drafted a related jury instruction used by the prosecution team.

In terms of demeanor, Anthony has a positive and even-tempered attitude. He worked well with his fellow externs and my office's attorneys. Moreover, we were impressed with Anthony's passion for public service. He often spoke about how his experience in the United States Navy led him to apply to law school, and about his pro bono work for veterans and victims of domestic violence. It was clear to me and the rest of my office that Anthony genuinely wants to devote his legal career toward helping his community and others in need.

Ultimately, I am confident that Anthony's passion and work ethic will benefit your chambers just as it has my office. I recommend him without reservation.

You are welcome to contact me if you have any questions or want any additional information.

Very truly yours,

Benjamin R. Barron
Assistant United States Attorney
Chief, Santa Ana Branch Office

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Anthony Birong to you for a position as a law clerk in your chambers. I am pleased to write this letter because Mr. Birong is an outstanding law student and is exceptionally bright.

Mr. Birong was a student in my Lawyering Skills I and II courses during the 2021-22 school year and was a research fellow for me for the Lawyering Skills course this past year. Lawyering Skills is a year-long, six-credit first-year course where students are introduced to most of the basic skills a lawyer needs to practice law effectively. In Lawyering Skills I students learn expository writing by preparing office memoranda. Students also learn legal research and analysis through a series of writing assignments. Students also prepare email memos. In Lawyering Skills II students learn persuasive writing and advanced research skills and strategies when they prepare a motion for summary judgment. In addition, students engage in oral argument and negotiation. Drafting, client interviewing and counseling, and problem-solving skills are also introduced, and students prepare written documents to demonstrate their mastery of those skills. I meet with students individually numerous times to review their written work, and I become well-acquainted with them.

From my first encounter with Mr. Birong, I was impressed with Mr. Birong's abilities and intellect. I learned he had served on swift boats in the U.S. Navy; an impressive military experience. He possesses a superior intellect, and he is an accomplished legal writer. He has outstanding research skills, and a creative and inquiring mind. I have found students who have served in the military have superior teamwork skills and know how to work diligently. He often identifies issues no one else uncovers. His work is consistently excellent and timely. He was a frequent class participant, and his comments were always incisive. All the projects he completed in Lawyering Skills provide examples of his excellent writing ability and superior analytical ability.

Mr. Birong is generous to other law students and knows how to work as a team member. Due to his intellect and skills, I asked him to be a Research Fellow for my Lawyering Skills class this academic year. In choosing Research Fellows I look for bright, diligent, thorough, and kind students who like to mentor first-year students, and Mr. Birong was my top choice this year. He met regularly with my students, reviewed their draft assignments, and provided commentary to them and to me. He is an excellent editor and has improved the writing skills of many of my students. His generosity and willingness to mentor and help other law students is exemplary. In my experience, the brightest people I know are usually the most generous. Students report how much they have benefitted from his guidance, and his dedication to them is obvious. His work was timely and thorough even when he was occupied in other student organizations and activities.

Even at this early stage of his legal career, Mr. Birong's work is better than many practicing lawyers. Undoubtedly, he will be an outstanding law clerk and lawyer. I would feel comfortable having him as my attorney. He has worked on a number of research projects for me, and I can rely on his analysis and research. He has great judgment, has the ability to identify issues many others miss, and has all the characteristics of an accomplished lawyer.

Mr. Birong is a person with a great sense of humor, and he is humble and trustworthy. His keen judgment and exemplary character are just two of his attributes. I am willing to recommend him enthusiastically for any position of responsibility. I have no hesitancy about recommending him to you, and I am happy to answer any questions you may have about him.

Very truly yours,

Grace C. Tonner

(949) 824-4037

gtonner@law.uci.edu

Grace Tonner - gtonner@law.uci.edu - (949) 824-4037

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Anthony Birong

Dear Judge Walker:

I write to recommend that you hire Anthony Birong as one of your judicial clerks. In his first semester of law school, Anthony was a student in my first-year Contracts class (called Common Law Analysis: Contracts). Anthony was an active participant in class discussions. I use the Socratic Method but rely on volunteers. Anthony was one of the few students who was always willing to engage. His comments were unfailingly thoughtful and on point. Anthony performed excellently in the class, writing a very strong final. Overall, it was a real standout performance and earned him an A in a very competitive class.

Although the class had 43 students, I got to know Anthony very well during office hours and other events outside of class. He is intellectually curious and whip smart. I thought so highly of Anthony that I asked him to be my Research Assistant. Anthony has performed extensive research for my project on banking deserts, which are communities without access to bank branches. He wrote memoranda about relationship lending, the practice of bankers extending credit based on personal knowledge of the borrower as opposed to credit scores and hard data. Anthony researched historical changes in relationship lending and how minority buyers now rely on relationship lending. He studied DOJ Banking Merger Guidelines, including how the Federal Reserve defines geographic markets. In addition to discussing several bank merger cases in the last 40 years, Anthony also performed a case study on a bank merger that proved pivotal in my scholarship. Overall, this project involved extensive factual, legal, and empirical research.

Beyond this large-scale project, Anthony also performed research on price-fixing defendants who argue that they cannot be liable for price fixing because they cheated on the cartel agreement. This is a particularly difficult assignment that I have had previous research assistants attempt. Anthony found relevant caselaw that others had not. I was very impressed with his research skills. Finally, he researched caselaw interpreting and applying summary judgement standards in antitrust and non-antitrust opinions. His work product was exactly what I asked for and was very helpful.

In addition to his original research, Anthony proofread and provided useful comments on several of my projects, including a new edition of an Antitrust Law casebook that I co-author, an article on how predatory pricing jurisprudence has influenced antitrust doctrine, and a paper on how the Respect for Marriage Act applies to U.S. territories. For each project, Anthony provided valuable suggestions that improved my scholarship. This bodes well for his ability to work with his co-clerks to improve their bench memos and draft opinions.

Anthony is an incredibly hard worker. During his first summer, he performed this research in addition to his full-time externship with a federal judge. Anthony never begrudges hard work and approaches all tasks with enthusiasm and a great attitude. He asks smart questions and is always clear on deadlines and expectations.

Finally, on a personal level, Anthony is one of the nicest, most humble people you will ever meet. He is always upbeat and generous, with an excellent sense of humor. I have enjoyed my conversations with him immensely.

In sum, Anthony would be a great addition to your chambers. If you have any questions, please feel free to contact me at cleslie@law.uci.edu or (949) 824-5556.

Sincerely,

Christopher Leslie
Chancellor's Professor of Law

Christopher Leslie - cleslie@law.uci.edu - 949-824-5556

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

The attached writing sample is an order I drafted as a judicial extern to the Honorable Otis D. Wright II. This order was lightly edited by Judge Wright's clerks and reviewed by Judge Wright. Names and dates have been changed or redacted per Judge Wright's requirements. I have received permission to use this order as a writing sample.

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

I. INTRODUCTION

On [redacted], Plaintiff Lola Jackson initiated this action in state court against Defendants ABC Co. and “Devin,” an individual. (Notice of Removal (“NOR”), Ex. 1 (“Complaint” or “Compl.”), ECF No. 1-1.) On [redacted], ABC removed the case to this Court based on diversity jurisdiction. (NOR, ECF No. 1.) Jackson now moves to remand. (Mot. Remand (“Motion” or “Mot.”), ECF No. 20.) For the reasons below, the Court finds it has subject matter jurisdiction and accordingly **DENIES** Jackson’s Motion.¹

II. BACKGROUND

As Jackson alleges, on [redacted], Jackson was visiting ABC’s store to purchase miscellaneous items. (Compl. ¶¶ 8, 14.) After entering the store, Jackson slipped on a substance on the floor and fell, sustaining injuries. (*Id.*) Jackson alleges that an individual named Devin was the supervisor of the store responsible for maintenance at the time of her fall. (*Id.* ¶ 3.)

Jackson originally filed this action in state court, asserting causes of action for negligence and premises liability against ABC and “Devin.” (*Id.* ¶¶ 7–17.) ABC later removed this action to federal court based on diversity jurisdiction, asserting that: (1) ABC is a citizen of Arkansas and Delaware; (2) Jackson is a citizen of California; (3) Devin’s citizenship should be disregarded; and (4) the amount in controversy exceeds \$75,000. (NOR 3.) ABC therefore contends that this Court has subject matter jurisdiction.

On [redacted], the Court questioned its jurisdiction and ordered ABC to show cause why this action should not be remanded to state court for lack of subject matter jurisdiction. (Order Show Cause (“OSC”), ECF No. 10.) On [redacted], ABC responded to the Court’s Order to Show Cause, (Resp. OSC, ECF No. 11), and amended its Notice of Removal, (Am. NOR, ECF No. 11). On [redacted], the Court, satisfied with ABC’s showing

¹ Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

and amended notice of removal, discharged the Order to Show Cause. (Min. Order, ECF No. 13.)

Subsequently, on [redacted], Jackson moved to remand on the ground that ABC failed to establish diversity jurisdiction. (*See generally* Mot.) In her Motion, Jackson asserts that Devin, whose real identity is unknown, is a citizen of California and defeats diversity. (*Id.* at 21.) Jackson also contends that ABC has failed to establish that the amount in controversy exceeds \$75,000. (*Id.* at 23.) Finally, Jackson seeks attorneys' fees in association with her Motion. (*Id.* at 28–30.) ABC opposes the Motion. (*See* Opp'n, ECF No. 22.) Jackson did not file a Reply.

III. LEGAL STANDARD

Federal courts have subject matter jurisdiction only as authorized by the Constitution and Congress. U.S. Const. art. III, § 2, cl. 1; *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). When a suit is filed in state court, the suit may be removed to federal court only if federal court would have had original jurisdiction. 28 U.S.C. § 1441(a). Federal courts have original jurisdiction when an action arises under federal law or where there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. *Id.* §§ 1331, 1332(a).

Courts strictly construe the removal statute against removal and “federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The party seeking removal bears the burden of establishing federal jurisdiction. *Id.*

IV. DISCUSSION

The Court finds that it has subject matter jurisdiction because the parties are diverse and the amount in controversy is met. Accordingly, as explained below, the Court denies Jackson's Motion to remand and request for attorneys' fees.

A. Diversity of Citizenship

At the outset, it is uncontroverted that there is complete diversity of citizenship between Jackson and ABC. Jackson is a citizen of California and ABC is a citizen of

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Delaware, where it is incorporated, and of Arkansas, where it holds its principal place of business. (NOR 3.) However, Jackson contends that ABC has failed to establish diversity of citizenship because Jackson alleges that Devin is a citizen of California. (Mot. 2, 21; Compl. ¶ 3.) The Court disagrees, and finds that the parties are diverse from each other because Devin is a fictitious defendant whose citizenship may be disregarded.

“In determining whether a civil action is removable on the basis of jurisdiction under section 1332(a) . . . the citizenship of defendants sued under fictitious names shall be disregarded.” 28 U.S.C. § 1441(b)(1). The Ninth Circuit has explicitly held that “[t]he citizenship of fictitious defendants is disregarded for removal purposes and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant.” *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002).

Some courts have found a distinction between “fictitious” and “real” Does. *See, e.g., Gardiner Fam., LLC v. Crimson Res. Mgmt. Corp.*, 147 F. Supp. 3d 1029, 1036 (E.D. Cal. 2015). Courts considering this distinction assess whether the “[p]laintiffs’ description of Doe defendants or their activities is specific enough as to suggest their identity, citizenship, or relationship to the action.” *Id.*; *see Johnson v. Starbucks Corp.*, 475 F. Supp. 3d 1080, 1083 (C.D. Cal. 2020).

Jackson contends that Devin is not “wholly fictitious” and may not be disregarded. (Mot. 21.) The Court disagrees. Without including a last name or any other identifying details, Jackson merely identifies Devin as “a supervisor and/or manager of the store at the time of Plaintiff’s slip and fall” who was “responsible for the maintenance of the store.” (Compl. ¶ 3.) This description is not specific enough to suggest Devin’s identity and therefore is insufficient to render Devin a real Defendant.

Moreover, Jackson has been unable to supplement Devin’s identity, even after conducting discovery. ABC provided Jackson witness statements and an incident report. (*See Decl. [redacted] ISO Opp’n ¶¶ 6, 7, Exs. 1, 2, ECF No. 22-3.*) Neither lists any employee named Devin. At the time of the incident, there were no managers responsible

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for maintenance of the store named Devin.² (Decl. [redacted] ISO Am. NOR ¶ 8, ECF No. 12-12.)

Therefore, Devin is a fictitious defendant. Pursuant to the plain language of 28 U.S.C. § 1441(b)(1) and Ninth Circuit precedent, this Court cannot consider Devin’s citizenship unless and until Jackson seeks leave to substitute a named defendant. Accordingly, this Court looks only to the citizenships of Jackson and ABC and finds that complete diversity exists for the purpose of establishing subject matter jurisdiction.

B. Amount in Controversy

Jackson contends that ABC fails to establish that the amount in controversy exceeds \$75,000. (Mot. 23–26.) However, the Court finds that the amount in controversy is met because Jackson has previously admitted that the amount in controversy exceeds \$75,000.

“[A] defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014). If the plaintiff disputes the alleged amount in controversy, “both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.” *Id.* at 88. “The parties may submit evidence outside the complaint, including affidavits or declarations, or other ‘summary-judgment-type evidence relevant to the amount in controversy at the time of removal.’” *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*,

² In any case, as ABC correctly points out, a person’s place of employment alone does not implicate their citizenship status. *See Garcia v. Walmart, Inc.*, No. 2:22-cv-00371-SVW-MRW, 2022 WL 796197, at *3 (C.D. Cal. March 16, 2022) (“[A] person’s place of employment does not certainly implicate their citizenship status, especially in a state as diverse as California comprised of out-of-state college students, immigrants from different countries and many other multinationals.” (internal quotation marks omitted)). Therefore, even if Devin was properly identified as a real party to this action, the Court still could not, at this time, conclude that Devin indeed is a California citizen and defeats diversity.

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116 F.3d 373, 377 (9th Cir. 1997)). “[A] defendant cannot establish removal jurisdiction by mere speculation and conjecture, with unreasonable assumptions.” *Id.*

Jackson does not allege a specific amount of damages, but seeks to recover general damages, medical expenses, loss of earnings, interest, and costs of suit. (Compl. 5, Prayer for Relief.) ABC plausibly alleges that the amount in controversy exceeds \$75,000, (NOR 3), and supports this allegation with Jackson’s own admission, in response to ABC’s Request for Admissions, that her damages exceed \$75,000, (Decl. [redacted] ISO NOR (“[redacted] Decl. ISO NOR”), Ex. 7 No. 48, ECF No. 1-7; [redacted] Decl. ISO NOR, Ex. 8 No. 48, ECF No. 1-8). Thus, ABC has established removal jurisdiction with evidence rather than by mere speculation and conjecture based on unreasonable assumptions. *See Garcia*, 2022 WL 796197, at *1 n.1 (C.D. Cal. Mar. 16, 2022) (finding that the amount in controversy was satisfied because in the plaintiff’s response to requests for admission, the “Plaintiff explicitly admitted that he seeks damages in excess of \$75,000”). Accordingly, the Court finds the amount in controversy exceeds \$75,000 for the purpose of establishing diversity jurisdiction and that the Court therefore finds that it has subject-matter jurisdiction over this action.

V. CONCLUSION

For the reasons discussed above, the Court **DENIES** Jackson’s Motion to Remand, (ECF No. 20), and **DENIES** Jackson’s request for attorneys’ fees and costs incurred in association with the Motion.

Applicant Details

First Name **Cameron**
 Middle Initial **L**
 Last Name **Bishop**
 Citizenship Status **U. S. Citizen**
 Email Address cbishop@albanylaw.edu

Address

Address
Street
415 Engleman Avenue
City
Scotia
State/Territory
New York
Zip
12302
Country
United States

Contact Phone Number **5188594771**

Applicant Education

BA/BS From **Siena College**
 Date of BA/BS **January 2021**
 JD/LLB From **Albany Law School**
<http://www.albanylaw.edu/>
 Date of JD/LLB **May 17, 2024**
 Class Rank **10%**
 Law Review/Journal **Yes**
 Journal(s) **Albany Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Domenick L. Gabrielli Appellate Advocacy**
Moot Court Competition
Donna Jo Morse Client Counseling
Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Wetmore, Michael
mwetm@albanylaw.edu
Connors, Patrick
pconn@albanylaw.edu
Mayer, Connie
cmaye@albanylaw.edu
(518) 445-2393

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cameron Bishop

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court, Eastern District of Virginia

Dear Judge Walker,

I write to express my interest in a clerkship in your chambers beginning in the 2024 term. I am a third-year student in the top 7% of my class at Albany Law School and have been interested in the federal judiciary since beginning law school. I achieved academic success in law school while simultaneously working part-time with a small law firm and interning with the Schenectady County District Attorney's Office. I would like to increase my knowledge of the federal court system and bring my strong research and writing abilities to the work of your chambers.

In law school, I have taken a particular interest in classes focused on federal laws. I have specifically enjoyed my time as a teaching assistant for Federal Civil Procedure, where I assisted the professor in helping students and reviewing their essays. I have furthered my interest in the judiciary by competing in Albany Law School's Gabrielli Appellate Advocacy Competition (Gabrielli Competition), where I was a finalist and won Best Oral Advocate Award in the competition. My experience as a sub-editor with the *Albany Law Review* has also improved my legal writing and research skills. I purposefully decided not to run for a position on the editorial board of the *Albany Law Review* because of my desire to engage in pro-bono work through the New York State Pro Bono Scholars Program next spring to give back to the community that has provided me with so much. If accepted into the program, I would complete the Uniform Bar Exam in February 2024 and graduate in May 2024. I will return to the *Albany Law Review* as an associate editor this fall.

As an intern with the Schenectady County District Attorney's Office for the last year, I wrote the respondent's brief for the appellate court in several cases. I also wrote letters to the Court of Appeals requesting the denial of the appellants' requests for leave to appeal and responses to the defendants' motions seeking relief under the Criminal Procedure Law § 440. This experience has enriched my understanding of the courts, and I would like to deepen that knowledge with experience in the federal judiciary through your chambers.

Enclosed please find my resume, law school transcript, writing sample, and letters of recommendation. My writing sample is the portion of my respondent's brief that I drafted for the Gabrielli Competition. Professors Connie Mayer, Patrick Connors, and Michael Wetmore have written my letters of recommendation. Upon your request, I would be happy to provide you with any additional information you wish to review. Thank you for considering my candidacy. I hope to have the opportunity to interview with you.

Sincerely,

Cameron Bishop

Cameron Bishop

Cameron Bishop

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EDUCATION

Albany Law School of Union University, Albany, NY

Candidate for Juris Doctor, May 2024

Class Rank: Top 7% (13/188: GPA: 3.92)

Honors: *Albany Law Review*; Dean Thomas Sponsler Honors Teaching Fellowship Program; Dean's List (Fall 2021 - Spring 2023)

Activities: Domenick L. Gabrielli Appellate Advocacy Moot Court Competition, Finalist and Best Oral Advocate; Donna Jo Morse Client Counseling Competition, Participant; Federal Civil Procedure and Criminal Law, Teaching Assistant

Siena College, Loudonville, NY

Bachelor of Arts, *magna cum laude*, Political Science, Pre-Law Certificate, December 2020

GPA: 3.74

Honors: Standish Honors Program; Pi Sigma Alpha and Pi Gamma Mu Honor Societies

Activities: Captain, Siena College Mock Trial Team

RELEVANT EXPERIENCE

Hon. Mae D'Agostino, U.S. District Court, N.D.N.Y., Albany, NY

Legal Intern

To Commence August 2023

Professor Connie Mayer, Albany Law School, Albany, NY

Research Assistant

To Commence August 2023

Barclay Damon LLP, Syracuse, NY

Summer Associate

May 2023 – Present

- Conduct legal research on various federal issues including diversity of jurisdiction and amending pleadings
- Prepare legal memoranda regarding potential causes of action

Schenectady County District Attorney's Office, Schenectady, NY

Legal Intern

June 2022 – May 2023

- Drafted appellate briefs and responses to motions
- Researched and applied case law to address issues on appeal
- Appeared on the record in city court regarding defendants' detention status

RoseWaldorf PLLC, Albany, NY

Intake Coordinator

March 2021 – May 2023

- Opened case files for claims and lawsuits
- Analyzed applicable rules and laws to calculate the due date for pleadings

OTHER EXPERIENCE

Pizza Hut, Clifton Park/Glenville, NY

Shift Manager

November 2017 - March 2021

COMPUTER SKILLS

Proficient in LexisNexis, Westlaw, Bloomberg Law, Expert Time, iManage, PCMS, PCLaw, LawManager, IBM SPSS Statistics, Microsoft Office, and Google Suites

BISHOP, CAMERON L.
06/10/2023

TRANSCRIPT OF RECORD

ISSUED:

Student No. 0586848-0124

ALBANY LAW SCHOOL
80 New Scotland Avenue, Albany, NY 12208
Telephone 518-445-2330
Fax 518-472-5889

Page 1 of 1

Matriculated: 08/23/2021 Program: JD 3 Year Anticipated Degree Date: 05/24
Concentration(s): Civil Litigation; Tax Law

	CR.HR	GRADE	QPTS		CR.HR	GRADE	QPTS
FALL 2021 (08/23/2021 to 12/20/2021)				LPRF RBRES Legal Profession	3.0	A	12.0
CONX PREYH Contracts	3.0	B+	9.9	NYP2 PCONN New York Practice II	3.0	B+	9.9
CIVP CMAYE Federal Civil Procedure	4.0	A	16.0	PTP2 MWETM Trial Practice II: Civil	3.0	A	12.0
IIJE AHARR Inter/Intragenerational Jst Sm	1.0	A-	3.7	Averaged: 15.00 Earned: 17.00	Q.Pts: 58.80		
ILWF AMOLO Introduction to Lawyering	3.0	A	12.0	SEM: GPA 3.92 Rank 24/188	CUM: GPA 3.92 Rank 13/188		
TORT PARMS Torts	4.0	A+	17.2				
Averaged: 15.00 Earned: 15.00	Q.Pts: 58.80			TOTALS Averaged: 58.00 Earned: 65.00	Q.Pts: 227.50		
SEM: GPA 3.92 Rank 18/193	CUM: GPA 3.92 Rank 18/194						

Satisfied Upperclass Writing Requirement

SPRING 2022 (01/18/2022 to 05/18/2022)

DEAN'S LIST

STUDENT IN GOOD STANDING UNLESS OTHERWISE INDICATED

CNSL VBONV Constitutional Law	4.0	A	16.0
CONT PREYH Contracts	2.0	A-	7.4
CRIM MWETM Criminal Law	3.0	A-	11.1
ILWS AMOLO Introduction to Lawyering	3.0	A-	11.1
PROP JROSE Property	4.0	A-	14.8
Averaged: 16.00 Earned: 16.00	Q.Pts: 60.40		
SEM: GPA 3.78 Rank 23/190	CUM: GPA 3.85 Rank 18/190		

NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL

FALL 2022 (08/22/2022 to 12/21/2022)

DEAN'S LIST

DAPL RMERG CLN:Alb Cnt DA FDPL Classroom	1.0	A+	4.3
FDPL JLCON CLN:Field Placement	3.0	P
FIRS VBONV Con Law II: First Amendment	2.0	A	8.0
EVDC MWETM Evidence	4.0	A+	17.2
HNRS CMAYE Honors Teaching Fellowship	2.0	CR
FORL AHAYN National Security Law	2.0	A	8.0
PUBH AWILL Public Health Law	3.0	A	12.0
Averaged: 12.00 Earned: 17.00	Q.Pts: 49.50		
SEM: GPA 4.13 Rank 6/184	CUM: GPA 3.92 Rank 11/185		

SPRING 2023 (01/16/2023 to 05/17/2023)

DEAN'S LIST

CPAD KSPRO Criminal Procedure: Adjudicatn	3.0	A+	12.9
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FEDJ	MHUTT	Federal Jurisdiction /Practice	3.0	A	12.0
LRME	VBONV	Law Review (Membership)	1.0	CR
LRWT	VBONV	Law Review (Writing)	1.0	CR



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June 12, 2023

To Whom It May Concern,

On behalf of one of my best students, I write this letter of recommendation in support of his candidacy for a judicial clerkship. By the date of this letter, I have recommended no other candidate for this position and would be hard-pressed to find another student matching Cameron Bishop's qualifications.

Academically, Cameron is exemplary. At Albany Law School, I teach two doctrinal courses, Criminal Law and Evidence, and an upper-level course, Trial Practice. The doctrinal courses examine the fundamental principles taught traditionally at all ABA-accredited law schools (elements of crimes and the Federal Rules of Evidence, respectively). Trial Practice, on the other hand, is an immersive experience where students learn the practical skills of a simulated jury trial. In Evidence, Cameron earned an "A+", the highest grade attainable in law school. In the other courses, he consistently performed with peer-shadowing proficiency, in the solid "A" range.

What sets Cameron apart from his peers is not just grades, however. Outside of the classroom, his unwavering commitment to analyzing complex legal issues, sharpening practical skills, and developing poignant, thought-provoking arguments puts him on another level of engagement. Last semester, Cameron was a semifinalist in the law school's most esteemed competition, the Domenick L. Gabrielli Appellate Advocacy Competition, and tied with another student for best oral advocate. In the final round, which I attended, Cameron had the most polished rhetorical prowess among the competitors, the kind exhibited by only the most seasoned advocates.

This recommendation is without any reservation. If you have any questions about Cameron or this letter, do not hesitate to contact me. I can be reached at 518-445-3201.

Yours sincerely,

Michael C. Wetmore
Visiting Assistant Professor of Law
mwetm@albanylaw.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter on behalf of a student, Cameron Bishop, who was in my New York Practice II class in the Spring 2023 Semester. Cameron is applying for a clerkship in your chambers.

New York Practice is Albany Law School's comprehensive review of the CPLR, which totals 6 credits. The course, originally designed by Professor David D. Siegel, is the most detailed course offered on the subject of New York Practice and is one of the most demanding courses offered at Albany Law School.

Cameron received a B+ in my New York Practice II course, which was an impressive achievement. Cameron was a second-year student in the class and was competing against third-year students who had already taken New York Practice I. Cameron wisely decided to take New York Practice II in his second year of law school because his schedule would not permit him to take the course in his third year. This required a great deal of preparation because the material covered in New York Practice II builds on knowledge obtained in the New York Practice I course.

Cameron worked very hard to learn the material and proved to be one of the finest students in the class. He demonstrated an admirable work ethic and was always prepared to discuss the detailed procedural issues we covered during class. He participated in almost every class! Therefore, it was no surprise when he received such a high grade in New York Practice II. I look forward to Cameron taking my New York Practice I class this fall.

Cameron's performance in my classes is typical of the high level of performance he achieved throughout his law school career and reflects the enthusiasm he brings to his studies. It is no surprise that he is ranked so highly in his class and is a Subeditor of the Albany Law Review. He also participated in the Domenick L. Gabrielli Appellate Advocacy Moot Court Competition, where he was a Finalist and Best Oral Advocate.

In addition to Cameron's hard work ethic, he is also a very intelligent and cordial person. I believe he possesses all of the skills necessary to be an outstanding law clerk. I clerked for Judge Richard D. Simons at the New York Court of Appeals from 1988 through 1991. During that time, I realized that judges and courts need law clerks who are not only bright, but mature and compatible. I firmly believe that Cameron satisfies all of these qualifications. He would be a strong asset to your chambers.

Please feel free to contact me if you have any questions regarding Cameron.

Thank you for your consideration in this matter.

Respectfully,

Patrick M. Connors
pconn@albanylaw.edu
518-445-2322

Patrick Connors - pconn@albanylaw.edu



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June 6, 2023

Re: Application of Cameron Bishop

To Whom it May Concern:

I am pleased to write this letter in support of the application of Cameron Bishop for a clerkship position. I have known Mr. Bishop since the fall of 2021 when he was a first-year law student in my Civil Procedure class. As a second-year law student, Mr. Bishop was invited to participate in the Sponsler Teaching Fellows Program and served as my teaching assistant for Civil Procedure in the fall of 2022 and for Criminal Law in the spring of 2023. Because I have had the pleasure of working with Mr. Bishop as a student and a teacher/mentor to other law students, I have had the opportunity to observe the quality of his work and I believe I am uniquely positioned to describe his professional attributes and qualifications. He is clearly within the top 5% of the students I have taught at Albany Law School.

Mr. Bishop is one of the brightest, hardest-working students I have ever had. As a student in my Civil Procedure class, Mr. Bishop distinguished himself from the very beginning of his law school career by demonstrating an excellent ability to spot relevant issues and analyze the legal and policy implications raised by those issues. He was always well-prepared for class and made a careful and thoughtful analysis of the cases and issues we were discussing. During class discussions, he often asked questions and raised issues that went beyond the cases we were discussing, leading to a richer and more meaningful class discussion. He demonstrated strength in oral communication and excellent analytical skills.

Because of his superior academic performance in his first year of law school, he was invited to participate in the Sponsler Teaching Fellows Program. The Sponsler Teaching Fellows Program is a highly selective academic honors program in which students ranked in the top 10% of their class at the end of their first year of law school are invited to assist in teaching and mentoring in the first-year curriculum. Mr. Bishop was assigned to my Civil Procedure class as a Sponsler Fellow in the fall of 2022 and was so effective that I asked him to continue in his teaching role in my Criminal Law course in the spring of 2023. He was extremely organized and conscientious, providing outstanding guidance and mentoring to the first-year students. He was available on a weekly basis to tutor students individually and organized review sessions periodically throughout both semesters. His presentations were easily understandable and accessible to his students. He provided clear feedback to students on their written work and assisted them with outlining the subject matter and organizing their materials. He was able to

work under pressure and meet every deadline while balancing his full course load, Law Review responsibilities, and Moot Court work. He was invaluable in assisting students in their learning process and those students regularly benefitted from his critical insights.

Throughout the two semesters, I have had many opportunities to observe and review Mr. Bishop's written and oral communications. His critical thinking skills and legal analysis are superior and his writing is thorough, detailed, clear, and precise. His strength in oral communication was demonstrated both in the classroom as a student and as a teaching assistant, and outside the classroom through his participation in Moot Court. Mr. Bishop was a finalist in the Gabrielli Appellate Advocacy Competition and was named Best Oral Advocate in the competition for 2023.

On a personal level, Mr. Bishop is responsible, trustworthy, and dependable. He never missed a deadline or turned in work that was anything but excellent. I recommend Mr. Bishop without reservation. He will bring outstanding written, oral and analytical skills, and a sound work ethic to the position. His exceptional academic record and intellect will make him an asset to your office. If you have any questions about this recommendation, please feel free to contact me as set out below.

Sincerely,



Connie Mayer

Raymond and Ella Smith Distinguished Professor of Law



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Cameron Bishop

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WRITING SAMPLE

This is my section of my appellate brief I wrote for Albany Law School's Gabrielli Appellate Advocacy Competition, where I was a finalist and won the Best Oral Advocate Award in the competition. The issue in my brief was arguing that the stop and frisk of the defendant, Nicholas Miller, did not violate his Fourth Amendment Rights. The analysis focused on two specific frisks of Mr. Miller's person: (1) the search of Mr. Miller's pant pocket, and (2) the search of his hoodie pocket. The statement of the case, summary of the argument, standard of review, and second argument of the brief sections are omitted as they were written together with my partner in the competition. The argument in this writing sample is exclusively my own writing.

ARGUMENT

I. THE NEW SCOTLAND SUPREME COURT, APPELLATE DIVISION CORRECTLY AFFIRMED THE TRIAL COURT’S DECISION TO DENY THE APPELLANT’S MOTION TO SUPPRESS THE OUNCE OF HEROIN FOUND IN HIS SWEATSHIRT POCKET DURING A SEARCH BY THE POLICE AND THAT SEARCH DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS.

The defendant’s Fourth Amendment rights were not violated when Officers Schmidt and Bishop reasonably performed a *Terry* stop and frisk on him. The frisk was reasonable under the totality of the circumstances.

It is undisputed that citizens of the United States (“U.S.”) have a right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Furthermore, “the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment].” *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Supreme Court has held that “in determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). This two-pronged analysis requires that:

First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.

Ariz. v. Johnson, 555 U.S. 323, 326–27 (2009). *See also U.S. v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017).

As it pertains to whether it was reasonable for the officer to stop an individual, it has been held that “an officer may conduct a brief investigatory stop if he has a **reasonable**,

articulable suspicion that criminal activity is afoot.” *U.S. v. Romain*, 393 F.3d 63, 71 (1st Cir. 2004) (citing *Terry*, 392 U.S. at 30) (emphasis added). In this analysis, “the totality of the circumstances—the whole picture—must be taken into account.” *U.S. v. Cortez*, 449 U.S. 411, 417 (1981). The key component in looking at the totality of the circumstances is “to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Cortez*, 449 U.S. at 417–418). The reasonable suspicion that arose from the totality of the circumstance “must be measured by what the officers knew before they conducted their search.” *Fla. v. J.L.*, 529 U.S. 266, 271 (2000). Furthermore, “the showing required to meet this standard is **considerably less demanding** than that required to make out probable cause, [but] the officer nonetheless must possess (and be able to articulate) more than a hunch, an intuition, or a desultory inkling of possible criminal activity.” *Romain*, 393 F.3d at 71 (citing *Terry*, 392 U.S. at 27) (emphasis added).

Courts have held that several factors in the totality of the circumstances weigh in favor of the reasonableness of the *Terry* stop, such as the “area's disposition toward criminal activity, [and] the time of night.” *U.S. v. Guardado*, 699 F.3d 1220, 1223 (10th Cir. 2012) (citing *Ill. v. Wardlow*, 528 U.S. 119, 124 (2000); *U.S. v. McHugh*, 639 F.3d 1250, 1257 (10th Cir. 2011); *U.S. v. Clarkson*, 551 F.3d 1196, 1202 (10th Cir. 2009)). Another factor courts consider is when an individual “match[es] the tipster's description.” *U.S. v. Sims*, 296 F.3d 284, 287 (4th Cir. 2002). Courts also consider the time of the *Terry* stop in relation to when the crime took place, and the distance from the *Terry* stop to where the crime occurred. *See U.S. v. Brown*, 159 F.3d 147, 150 (3d Cir. 1998); *U.S. v. Goodrich*, 450 F.3d 552, 562 (3d Cir. 2006); *U.S. v. Juv. TK*, 134 F.3d 899, 904 (8th Cir. 1998); *U.S. v. Tarrents*, 98 F. App'x 572, 573 (8th Cir. 2004); *U.S. v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982); *U.S. v. Mayo*, 361 F.3d 802, 805–06 (4th Cir.

2004).

After the stop, the officer may search the individual where the “purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable.” *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citing *Terry*, 392 U.S. at 30). However, “to proceed from a stop to a frisk (pat down for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous.” *Johnson*, 555 U.S. 323. The Supreme Court has defined “reasonable suspicion” as “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. *See also U.S. v. Berry*, 670 F.2d 583, 598 (5th Cir. 1982). Reasonable suspicion for a frisk exists where “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27. However, “[i]n the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” *Sibron v. N.Y.*, 392 U.S. 40, 64 (1968) (citing *Terry* 392 U.S.). Factors that can justify reasonable suspicion includes “the time of day, flight, the high crime nature of the location, furtive hand movements, an informant's tip, a person's reaction to questioning, a report of criminal activity or gunshots, and the viewing of an object or bulge indicating a weapon.” *Anderson v. U.S.*, 658 A.2d 1036, 1038 (D.C. 1995) (citing *Williams*, 407 U.S. at 147–48; *Cousart v. U.S.*, 618 A.2d 96 (D.C.1992); *Williamson v. U.S.*, 607 A.2d 471 (D.C.1992); *Gomez v. U.S.*, 597 A.2d 884 (D.C.1991); *Duhart v. U.S.*, 589 A.2d 895 (D.C.1991); *Stephenson v. U.S.*, 296 A.2d 606 (D.C.1972)).

During such a frisk, courts have held that “*Terry* does not in terms limit a weapons search to a so-called ‘pat down’ search. Any limited intrusion designed to discover guns, knives,

clubs or other instruments of assault are permissible.” *U.S. v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976). *See also U.S. v. Reyes*, 349 F.3d 219, 225 (5th Cir. 2003); *U.S. v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996); *U.S. v. Hawkins*, 830 F.3d 742, 745 (8th Cir. 2016). Generally, police officers are “authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a] stop.” *U.S. v. Hensley*, 469 U.S. 221, 235 (1985). An officer’s “inability to determine from a pat-down whether [a] pocket of [a] bulky coat contained a weapon, justifie[s] [a] probe of the pocket.” *U.S. v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979). In fact, “the Fourth Amendment permits non-intrusive, reasonable means other than a frisk where . . . the other means are necessary in the circumstances to ensure that the suspect is not armed.” *U.S. v. Edmonds*, 948 F. Supp. 562, 566 (E.D. Va. 1996), *aff’d*, 149 F.3d 1171 (4th Cir. 1998), *cert. denied*, 525 U.S. 912 (1998). This “includ[es] reaching into a suspect’s coat pocket and lifting a suspect’s shirt.” *U.S. v. Terry*, 718 F. Supp. 1181, 1187 (S.D.N.Y. 1989), *aff’d*, 927 F.2d 593 (2d Cir. 1991) (citing *Thompson*, 597 F.2d at 191; *Hill*, 545 F.2d at 1193). A search beyond a “pat down” must be “reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man.” *Sibron*, 392 U.S. at 65. In reviewing such a search:

A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But “[t]he fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, itself, render the search unreasonable.”

U.S. v. Sharpe, 470 U.S. 675, 686–87 (1985) (citing *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973); *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)). *See also Mich. v. Long*, 463 U.S. 1032, 1052 (1983); *U.S. v. Sokolow*, 490 U.S. 1, 11 (1989). Notably, “[t]he question is not

simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it.” *U.S. v. Sanders*, 994 F.2d 200, 204 (5th Cir. 1993).

Indeed:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minn. v. Dickerson, 508 U.S. 366, 375–76 (1993).

In *U.S. v. Hughes*, on September 24, 1992, Detective Robert Malmquist (“Detective Malmquist”) “obtain[ed] information from a confidential informant (“C.I.”) that a man named ‘Lonnie,’” was selling cocaine and “often carried a gun and drove a white Cadillac,” and provided Detective Malmquist with Lonnie’s address (“the residence”). 15 F.3d 798, 800 (8th Cir. 1994). As a result of this information, Detective Malmquist got a search warrant to search the house the informant proved him with as well as anyone inside. *Id.* Then “[a]fter the search warrant was obtained, the officers observed the residence a number of times over several days looking for the return of the white Cadillac.” *Id.*

Five days later, “[o]n September 29, 1992, at approximately 4:00 p.m., Agent Catherine Kaminski and Detective Malmquist noticed a white Cadillac parked in front of the residence under surveillance. A license check revealed that the car was registered to . . . Lonnie Hughes” (“Hughes”). *Id.* Later “[o]n that same day, the confidential informant called [Hughes] and asked him to deliver an ounce of cocaine to him. [Hughes] allegedly told the informant that he had the cocaine, but he would be unable to deliver it and told the informant to come to the . . . residence to buy the drugs.” *Id.* Then, a couple of hours later “[a]t 6:00 p.m., the officers returned to the area to execute the warrant [and] observed the white Cadillac still parked in front of the

residence, this time with three people traveling [sic] back and forth, moving things from the residence to the car.” *Id.* After seeing this, “[o]ne of the individuals then got into the Cadillac and drove past Agent Kaminski and Detective Malmquist, who were able to identify the driver as Hughes. The officers followed the Cadillac until it pulled into an alley and parked.” *Hughes*, 15 F.3d at 800. It was then that Hughes “got out of his car as the officers approached.” *Id.*

Because of “knowledge that Hughes had a criminal history of a previous weapons violation, and the [C.I.]’s statement that [Hughes] often carried a gun, the officers performed a pat down search of [Hughes]’s clothing prior to any questioning.” *Id.* When “Detective Malmquist conducted the search for weapons, he felt a bulge in appellant’s left jacket pocket which turned out to be \$2,390 in cash. The pat down search of [Hughes]’s left front trouser pocket revealed small lumps which [Detective] Malmquist believed to be crack cocaine.” *Id.* When Detective Malmquist inspected the lumps, he “discovered that these were in fact nine rocks of crack cocaine, five of which were individually wrapped, and weighing a total of 2.5 grams. Appellant was then placed under arrest and a warrant was obtained to search appellant’s car.” *Id.* The subsequent “search of the trunk revealed 23 grams of crack cocaine and 6 grams of cocaine powder hidden on the underside of a child’s car seat. The officers also found a fully-loaded .22 caliber revolver in an overnight bag located in the trunk of the car, next to the booster seat.” *Id.* Hughes was thereafter “convicted of possession with intent to distribute cocaine base . . . and with using a firearm during and in relation to a drug trafficking offense.” *Hughes*, 15 F.3d at 799.

The Court, in applying *Terry* and its progeny, reviewed whether the “evidence was seized in violation of his Fourth Amendment rights.” Specifically, Hughes argued “that the search of [Hughes’s] pockets exceeded the scope of a *Terry* frisk for weapons.” *Id.* at 802. The

Court, in reviewing this claim, summarized the conduct of Detective Malmquist by stating that “[a]s Detective Malmquist patted down appellant’s outer clothing he first discovered a large lump in appellant’s front pocket which turned out to be a wad of cash. As he continued to search for weapons he patted [Hughes]’s pants pocket and felt what he ‘thought would be crack cocaine.’” *Id.* The Court contrasted between *Dickerson* and found that:

[I]n the instant case Detective Malmquist testified that when he patted down appellant’s pants pocket for weapons he “could feel lumps that [he] thought would be crack cocaine.” According to his testimony, Detective Malmquist’s first impression was that the object was contraband; there was no further manipulation of the object. Therefore, under *Dickerson*, the officer was entitled to seize the item. We conclude the initial stop, subsequent frisk and eventual seizure of the contraband was in accord with the *Terry* test.

Id.

In this case, the seizure of the heroin from the defendant did not violate his Fourth Amendment rights. Officers Schmidt and Bishop, during their routine patrol on August 10, 2021, “between 5:35 AM and 5:40 AM, the officers received a call that there was a possible suspect in the area that had just robbed a local jewelry store. The officers were given a brief description of the suspect and were told to be on alert.” Record on Appeal (“R.A.”) at 10.¹ The officers eventually saw the defendant “who fit the description of the robbery suspect. Specifically, the [defendant] was just under six feet tall with an average build and was wearing what law enforcement described as a unique pair of bright orange, yellow, and green Nike sneakers.” R.A. at 10. Furthermore, “[w]hen the officers continued to ask questions, [the defendant] refused to answer them.” R.A. at 11. It should also be noted that the officers were in a “high crime” area that “was known that drug and black-market sales occurred often in the area.” R.A. at 10. Based on the totality of the circumstances, the officers performed a *Terry* frisk

¹ All citations in the form “R.A. at ___” are to the Record on Appeal.

on the defendant, who they reasonably believed to be armed and dangerous. *See Cortez*, 449 U.S. at 417. During the frisk, “the officers found in Mr. Miller’s pant pocket a bag of sour patch kids, a can of Red Bull, and a receipt for the purchases. When they searched Mr. Miller’s sweatshirt pocket, they discovered a total of one ounce of heroin, which had been split into several different bags.” R.A. at 11.

As was the case in *Hughes*, the defendant was frisked in search of a weapon, and subsequently drugs were found in his pockets. R.A. at 11. In *Hughes* where following Detective Malmquist’s frisk of Hughes, Detective Malmquist “felt a bulge in [Hughes]’s **left jacket pocket** which turned out to be \$2,390 in cash” and “[t]he pat down search of appellant’s **left front trouser pocket** revealed small lumps which Officer Malmquist believed to be crack cocaine.” *Hughes*, 15 F.3d at 800 (emphasis added). Similarly, here Officers Bishop and Schmidt saw a bulge “weighing down [the defendant’s] **pant pocket**,” and found only “a bag of sour patch kids, a can of Red Bull, and a receipt for the purchases” in his pant pocket. R.A. at 10-11 (emphasis added). Following the search of the defendant’s pant pocket, the officers searched his **sweatshirt pocket** and found “one ounce of heroin, which had been split into several different bags.” Since besides the pat down frisk the officers conducted on the defendant “there was no further manipulation of the object . . . under *Dickerson*, the officer[s] [were] entitled to seize the item[s]” in the defendant’s pockets. *Hughes*, 15 F.3d at 802. *See also Terry*, 718 F. Supp. at 1187.

Even if this Court were to find “that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means . . . [that] does not, itself, render the search unreasonable.” *Sharpe*, 470 U.S. at 687. The officers reasonably believed the defendant, who was not answering their questions, in a high crime area, at 6:00 a.m., who matched the

description of a robbery suspect who they reasonably believed to be armed and dangerous, and therefore the *Terry* frisk was reasonable. Since “[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it,” Officers Schmidt and Bishop, even **if** an alternative was available, were not acting unreasonably in failing to recognize it or pursue it. *Sanders*, 994 F.2d at 204.

Officers Schmidt and Bishop did not violate the defendant’s Fourth Amendment rights when they performed a *Terry* stop and frisk on him. The stop and frisk were both reasonable under the totality of the circumstances. Even if there were other less intrusive means for the officers to protect the public, the search was still reasonable under the circumstances.

Applicant Details

First Name	Jack
Last Name	Bolen
Citizenship Status	U. S. Citizen
Email Address	jb6396@nyu.edu
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Contact Phone Number	3016515610

Applicant Education

BA/BS From	Cornell University
Date of BA/BS	May 2018
JD/LLB From	New York University School of Law
	https://www.law.nyu.edu
Date of JD/LLB	May 15, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Legislation and Public Policy
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Friedman, Barry
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Issacharoff, Samuel
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jack Bolen

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June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915 United States

Dear Judge Walker:

I write to apply for a clerkship in your chambers for the 2024 – 2025 term. I am entering my third year at NYU School of Law, where I am the Senior Articles Editor on the *Journal of Legislation and Public Policy*. I was born in Fairfax, Virginia and currently work as a summer associate at Williams & Connolly in Washington, D.C. I plan on practicing in the D.C. area after graduation.

Enclosed are my resume, law school transcript, and writing sample. I will be taking Federal Courts during my third year. The following professors will be sending letters of recommendation separately and are available for any inquiries:

- Professor Bob Bauer, robert.bauer@nyu.edu, (212) 998-6112
- Professor Barry Friedman, barry.friedman@nyu.edu, (212) 998-6293
- Professor Samuel Issacharoff, samuel.issacharoff@nyu.edu, (212) 998-6580

In addition, Judge John G. Koeltl would be pleased to discuss my candidacy based on my performance in his Constitutional Litigation Seminar. He may be reached at:

- Judge John G. Koeltl, John_G_Koeltl@nysd.uscourts.gov, (212) 805-0222

As my application materials demonstrate, I would bring experience in civil and criminal litigation to a clerkship. For two years prior to law school, I worked as a paralegal at the Manhattan District Attorney's Office. During those years, I assisted ADAs in the Rackets Bureau with all stages of criminal litigation and investigation, including by drafting search warrants, subpoenas, and legal memos. At NYU School of Law, I assisted Professor Friedman with research into the scope of Fourth Amendment protections under the third-party doctrine. My work at Williams & Connolly this summer has included helping attorneys counsel clients on multi-state class actions. I would be honored to contribute my skills to the important work of your chambers.

I am happy to provide any other information that would be useful in your evaluation of my application. Thank you for your time and consideration.

Sincerely,



Jack Bolen

Additional References

- Ricky Revesz, OIRA Administrator and Dean Emeritus of NYU School of Law, rlr2@nyu.edu, (212) 998-6185
- Jack Lienke, Regulatory Policy Director, Institute for Policy Integrity, jack.lienke@nyu.edu, (212) 998-6201
- Angie Morelli, Assistant District Attorney, Manhattan District Attorney's Office, morellia@dany.nyc.gov, (347) 697-9790

JACK BOLEN

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EDUCATION

New York University School of Law, New York, NY

J.D. Candidate, May 2024

Unofficial GPA: 3.70

Honors: *McKay Scholar* (Top 25% of class after four semesters)
Journal of Legislation and Public Policy, Senior Articles Editor
Dean's Scholarship
Activities: Prison Teaching Project, Teacher at Rikers Island
Regulatory Policy Clinic, Member

Cornell University, Ithaca, NY

B.A. in Government, May 2018

Honors: Dean's List

Activities: Men's Varsity Lacrosse, Starting Midfielder and Ivy League Champion

EXPERIENCE

Williams & Connolly, Washington, DC

Summer Associate, May 2023-present

Work with attorneys to develop case strategy and counsel clients on complex civil litigation matters, including class actions.

Senate Judiciary Committee, Washington, DC

Law Clerk, Senator Richard Blumenthal (D-CT), May 2022-August 2022

Researched legal issues relating to voting rights, reproductive rights, and gun violence prevention. Authored an internal memo on the constitutional right to travel post-*Dobbs*. Drafted hearing memos and witness questions. Vetted judicial nominees.

Professor Barry Friedman, New York, NY

Research Assistant, May 2022-December 2022

Researched the third-party doctrine, data trusts, and government surveillance programs. Wrote weekly memos.

Manhattan District Attorney's Office, New York, NY

Paralegal, Rackets Bureau, July 2019-May 2021

Served as the Rackets Bureau's lead analyst on multiple cryptocurrency money laundering investigations. Analyzed blockchain patterns and dark-web marketplaces to identify opioid vendors, international fraud rings, and CSAM. Assisted in the drafting and editing of search warrants, memos, and subpoenas. Interviewed victims, witnesses, and defendants.

Credit Suisse, New York, NY

Analyst, Global Credit Sales & Trading, July 2018-June 2019

Analyzed the debt of companies, sectors, and sovereigns as a member of a 40-person trading team with over \$100 million in revenue in 2018. Contributed to a weekly research publication outlining trends in the US credit market.

Intern, Sales & Trading, May 2017-August 2017

Worked under the Chief Economist as part of the US Macroeconomics group.

United States Senate, Washington, DC

Intern, July 2016-August 2016

Drafted and edited memos summarizing proposed legislation. Researched issues impacting key votes and attended hearings.

ADDITIONAL INFORMATION

Enjoy oil painting, Bob Dylan, and basketball.

Name: John P Bolen
 Print Date: 06/08/2023
 Student ID: N18705013
 Institution ID: 002785
 Page: 1 of 1

New York University
 Beginning of School of Law Record

School of Law
 Juris Doctor
 Major: Law

Fall 2021

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff Arthur R Miller			
Constitutional Litigation Seminar	LAW-LW 10202	2.0	A
Instructor: John G Koeltl			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
After the 2022 Election: the Paths and Challenges of Political Reform Seminar	LAW-LW 12398	2.0	A
Instructor: Robert Bauer			

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Edith Beerdsen				
Criminal Law	LAW-LW 11147	4.0	A-	
Instructor: Anna N Roberts				
Torts	LAW-LW 11275	4.0	B+	
Instructor: Daniel Jacob Hemel				
Procedure	LAW-LW 11650	5.0	A-	
Instructor: Troy A McKenzie				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Barry E Friedman Farhang Heydari				

Current	AHRS	EHR
Cumulative	12.0	12.0
	57.0	57.0
McKay Scholar-top 25% of students in the class after four semesters		
Staff Editor - Journal of Legislation & Public Policy 2022-2023		

End of School of Law Record

Current	AHRS	EHR
Cumulative	15.5	15.5

Spring 2022

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Edith Beerdsen				
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-	
Instructor: Samuel J Rascoff				
Contracts	LAW-LW 11672	4.0	A	
Instructor: Clayton P Gillette				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Barry E Friedman Farhang Heydari				
Criminal Procedure: Police Practices	LAW-LW 12697	4.0	B+	
Instructor: Barry E Friedman				

Current	AHRS	EHR
Cumulative	14.5	14.5
	30.0	30.0

Fall 2022

School of Law Juris Doctor Major: Law				
Regulatory Policy Clinic Seminar	LAW-LW 10105	2.0	A	
Instructor: Richard L Revesz Jack Henry Lienke				
The Law of Democracy	LAW-LW 10170	4.0	A	
Instructor: Samuel Issacharoff Richard H Pildes				
Regulatory Policy Clinic	LAW-LW 11029	3.0	A	
Instructor: Richard L Revesz Jack Henry Lienke				
Constitutional Law	LAW-LW 11702	4.0	A-	
Instructor: Kenji Yoshino				
Research Assistant	LAW-LW 12589	2.0	CR	
Summer 2022 Research Assistant				
Instructor: Barry E Friedman				

Current	AHRS	EHR
Cumulative	15.0	15.0
	45.0	45.0

Spring 2023

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	All other JD and LLM (Non-Mandatory)
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	Maximum for A tier = 31%
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	Maximum grades above B = 57%
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

**Barry Friedman***Jacob D. Fuchsberg Professor of Law**Affiliated Professor of Politics**Director, Policing Project*

40 Washington Square South, Rm. 317

New York, New York 10012-1099

Tel: (212) 998-6293

Fax: (212) 995-4030

barry.friedman@nyu.edu

Dear Judge,

I am writing on behalf of Jack Bolen, who is applying to clerk in your chambers anytime after he graduates in the Spring of 2024. Jack has been both my student and my research assistant, and I have had a good look at his capabilities. Based on my experience, I'm extremely supportive of his application.

I first met Jack in my 1L Reading Group on Big Brother Policing. We invite entering 1Ls to sign up for non-graded discussion groups. Jack worked in a prosecutor's office prior to law school, sparking his interest in data privacy and government oversight. He worked as an analyst on cryptocurrency investigations and saw close up how government was tapping into troves of privately-held data. This led to his interest in data privacy. He was an active participant – curious and thoughtful. Among a very active group of students, he stood out.

Jack was an equally great student in my 1L Criminal Procedure class. He performed well in class, though I clearly was the outlier that gave him his lowest grade in law school (a B+). I'd not give this much credit. In truth, Jack's already strong 1L grades have been on a notably sharp curve upward to the point that I doubt many students have done better than he. And, I would point out, that is in some seriously hard classes from some demanding professors. It's all very impressive.

Jack was equally impressive as my research assistant. He helped on a number of projects but the main was involves what the privacy and other constitutional implications will be of government adoption of central bank digital currency (CBDC). CBDCs are going to be the future, but it is not without concern that the government will have a ledger of the spending of each and every one of us. Jack worked on a number of projects, a central one being some groundbreaking research on data trusts—ways for the government to have access it needs to data, but not without strict controls. Jack was hard working, creative in approaches, always on time, and delivered to me a great amount of useful information.

I want to say a bit more about Jack, but first the important and expected information. He's smart. As I said, look at his grades, especially in his upper class year. But his smarts extend beyond that to clever approaches to research, and a capacious way of thinking. He's a very clear writer, as was evident in the various memos he wrote me, as well as the writing sample (a cert petition for a constitutional litigation class taught by Judge Koetl), that you will see.

Jack is an extremely hard-worker, dogged in getting to the bottom of a hard question. In truth, he just has an exuberant curiosity about and interest in the law.

There's something really special about Jack, which I would hope comes out in an interview, and certainly has been apparent working with him. I was struck by it again in reading the "clerkship questionnaire" that we ask students to fill out for us. I have read many of these – including a fair number this year alone. Jack's was a standout. He's just such a genuine person, full of love and interest for many topics around him. I was touched by reading about everything from his work teaching in the Prison Teaching Project, to his leadership as Senior Articles Editor for the Journal of Legislation and Public Policy, to—frankly—his 95 year old grandmother whom he admire. He's extremely engaging, and a great person to be around.

Jack's destined for an early career as a litigator, though he has interests in government service, both in the executive branch and working on the Hill (which he already has done). His current passion is voting rights and the law of democracy, not surprising for the times in which we live. He's going to be very successful at everything he does.

I strongly urge you to interview Jack. You'll like him; I surely do. And I can tell you having him work with you will be both rewarding and enjoyable.

I'd be happy to answer any further questions.

Best regards,



Barry Friedman



New York University

A private university in the public service

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Faculty of Law

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Samuel Issacharoff

Reiss Professor of Constitutional Law

Dear Judge:

Jack Bolen is a dynamic, smart, energetic and engaged law student. I have had him in two large classes (Law of Democracy and Complex Litigation) and he made a forceful impression on me in both. He is a unique and subtle thinker and engages with problems at a deeper level than other students. He has a background in finance and behavioral economics that serves him well at addressing decision making under conditions of uncertainty. Both the Law of Democracy and Complex Litigation address freighted issues in domains riddled with doctrinal imprecision. All students find these areas challenging; Jack found them invigorating.

Throughout law school, Jack has developed areas of engagement that focus on public policy and the promise of law for those least capable. Much of his attention has been devoted to the topics covered in the Law of Democracy and also in his course work and writing for Prof. Bob Bauer, formerly White House counsel under President Obama. But he has also made time to go to Rikers Island to teach a law course to prisoners there. This is no easy undertaking as just getting to Rikers and passing through the levels of security chews up a significant portion of the days involved.

On a personal level, Jack is an engaging as he is in class. He was extremely well educated at Cornell, despite the time taken as a star NCAA lacrosse player. He brings an unusual level of intellectual sophistication to discussions both inside and outside class. But what is most impressive is his effort to take on problems in their full complexity rather than search for a simpler, incomplete path out of the issues.

Jack will be going to Williams & Connelly this summer. This appeals to his deep interest in the high levels of litigation and the workings of the courts. He may well start off there, and certainly that firm does as great a job of training their associates as any. Nonetheless, I see him as heading into government service, as exemplified by his work over 1L summer for Senator Blumenthal. If he goes the route of the legislative branch, he will readily win people over with a winning demeanor and a ready smile.

In my opinion, Jack would be a first-rate law clerk. All the attributes that make him a successful law student will, in my view, allow him to perform admirably as a judicial clerk as well.

Please feel free to contact me if there is any further information I might provide.

Sincerely,

Samuel Issacharoff


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A private university in the public service

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Bob Bauer
Distinguished Scholar in Residence and Senior Lecturer
Co-Director of the Legislative and Regulatory Process Clinic

«DateForLetter»

RE: «Student»

Your Honor:

I am very pleased to write this letter of recommendation for Jack Bolen for a position as clerk in your chambers. Jack is an outstanding student, among the very best that I have ever had the privilege to teach. I have no doubt that he would perform splendidly in a clerkship role.

Jack was a student this spring in my seminar on political reform, which is part of the law school's offerings on topics in law and democracy. The seminar meets weekly for two hours, and students are expected to participate actively in class and, at the end of the semester, write a research paper of 20 to 25 pages on an approved topic. The course covers a wide range of issues in law and democracy, including campaign finance, redistricting, voting rights, lobbying reform, and alternate voting modes, such as ranked choice voting.

I had not had the occasion to work with Jack previously. He impressed immediately.

Jack is one of those students who improve the overall discussion of the class by the tone, close attention to relevance, and care with which he makes his contributions. He is exceptionally thoughtful, and there is evident in his remarks thorough preparation for the class and deep engagement with the subject matter.

Jack also displays keen intellectual curiosity. He listens to what other students have to say and asks useful follow-up questions in the course of conversation. In that respect, and not only in sketching out positions of his own, he enriches the conversation.

And Jack writes very well. He prepared an outstanding paper, which I justly graded an "A," on the topic of state legislative measures to wrest municipal and local control over education systems, law enforcement, and judicial process. He carefully and crisply analyzed the various legal theories underline potential (and pending) challenges. Within the space available, he provided insight into issues of expanding importance in the field of the law and democracy.

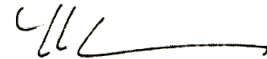
During the semester, Jack took the time to visit over office hours to follow up with me on class discussions. Sometimes in office hours students will use the opportunity to make sure they understand aspects of the last class conversation, to check in on what they might expect from exams, and to explore avenues for career development after graduation. All of that is fine. But Jack also displayed a genuine interest in just taking to the next level the lines of inquiry that we had pursued in class. I enjoyed those conversations as much as I hope Jack gained from them.

Jack's transcript tells the tale of a student who has excelled in the demanding coursework at NYU Law. And any one who has worked with Jack will appreciate that this performance reflects not just intellectual ability but a full commitment to the career path in the law that he has chosen.

I can enthusiastically commend Jack for a clerkship position as your chambers.

Should you have any questions or wish to discuss Jack's qualifications in any additional detail, I am available for a call at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Bob Bauer', with a stylized flourish at the end.

Bob Bauer

Writing Sample

Below is a petition for a writ of certiorari I wrote in Judge Koeltl's Constitutional Litigation Seminar. Each student was assigned the same case, 46 F.4th 1075, and instructed to draft a petition for a writ of certiorari. There was no further guidance or limitation. The table of contents and table of authorities are omitted. Judge Koeltl provided general feedback after submission, but none of his feedback has been incorporated into this document. This writing sample has not been reviewed or edited by anyone else.

No.

In the Supreme Court of the United States

SAN JOSE SCHOOL DISTRICT, PETITIONER

v.

FELLOWSHIP OF CHRISTIAN ATHLETES AND FELLOWSHIP
OF CHRISTIAN ATHLETES OF PIONEER HIGH SCHOOL,
RESPONDENTS.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

JACK BOLEN
Counsel of Record
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QUESTION PRESENTED

Whether First Amendment claims are categorically exempt from the ordinary burdens of 1) establishing Article III standing, and 2) proving likelihood of success on the merits, such that hearsay evidence of speculative injury is sufficient to obtain injunctive relief.

iii

PARTIES TO THE PROCEEDING

Petitioner, and defendant-appellant below, is San Jose Unified School District Board of Education.

Respondents, and plaintiffs-appellees below, are Fellowship of Christian Athletes and Fellowship of Christian Athletes of Pioneer High School.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 46 F.4th 1075. The opinion of the United States District Court for the Northern District of California denying petitioner's motion for a preliminary injunction is unreported, but available at 2022 WL 1786574.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on August 29, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case concerns critical questions that are the subject of conflict among federal courts of appeals: whether First Amendment claims seeking injunctive relief should be held to a lower standard for 1) establishing Article III standing, and 2) proving likelihood of success on the merits. Respondents sought prospective injunctive relief on the ground that petitioner violated the Free Exercise Clause of the First Amendment by selectively enforcing its non-discrimination policy. In finding that respondents were entitled to injunctive relief, the Ninth Circuit declined to apply the usual standard for evaluating Article III standing and likelihood of success on the merits. Instead, the Ninth Circuit employed a more lenient test.

The Ninth Circuit majority's analysis started from the premise that First Amendment suits are

categorically different. The majority asserted that First Amendment claims are subject to lower burdens of proof for establishing Article III standing and proving likelihood of success on the merits. In evaluating standing, the majority stated: “[w]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.” *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1090 (9th Cir. 2022). The majority also applied a more lenient standard in evaluating respondents’ likelihood of success on the merits. Whereas the normal injunctive relief standard requires the party seeking injunctive relief to make a “clear showing” that it is “likely to succeed,” *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 24 (2008), the majority applied a standard whereby “the existence of a colorable First Amendment claim” is “sufficient to merit the grant of relief.” 46 F.4th at 1098.

The proper standard for evaluating First Amendment claims seeking injunctive relief is the subject of widespread confusion. Despite this Court’s firm approach to the standing inquiry in *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013), several lower courts continue to employ a more lenient standing standard to First Amendment claims. And despite this Court’s clear articulation of the four injunctive relief factors in *Winter*, in which this Court held that injunctive relief was an “extraordinary remedy” that required a “clear showing” of likely success on the merits, 555 U.S. at 22, several lower courts have found that a colorable claim suffices when the First Amendment is invoked.

In evaluating standing in the context of First Amendment claims, the lower courts are sharply divided over how to reconcile *Clapper*, which articulated the proper inquiry for Article III standing,

with *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which concerned only prudential standing. The D.C. Circuit, Second Circuit, and Fifth Circuit properly recognize that the prudential standing inquiry and Article III standing inquiry are distinct: First Amendment claims are never exempt from the full burden of establishing Article III standing, as outlined in *Clapper*. Instead, it is only *prudential* standing requirements that may be relaxed for certain species of First Amendment claims. “Plaintiffs repeatedly assert that the requirements of standing are relaxed in the First Amendment context. That is true, but only as relating to the various court-imposed prudential requirements of standing.” *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018). “Under the [First Amendment] overbreadth doctrine, the prudential limitations against third party standing are relaxed . . . Even so, the reviewing court must consider whether the third party has sufficient injury-in-fact to satisfy the Article III case-or-controversy requirement.” *United States v. Smith*, 945 F.3d 729, 736 (2d Cir. 2019) (internal quotation marks and citation omitted).

The Ninth Circuit and several other courts of appeals conflate prudential standing and Article III standing. Failing to see the distinction drawn by *Clapper*, they have turned *Munson* and *Broadrick*’s prudential overbreadth doctrine into a broad First Amendment rule. The mistake is glaring and pervasive: “[t]he First Amendment standing inquiry is ‘lenient’ and ‘forgiving.’ This leniency ‘manifests itself most commonly in the doctrine’s first element: injury-in-fact.’” *Turtle Island Foods v. Thompson*, 992 F.3d 694, 699-700 (8th Cir. 2021) (internal citations omitted). “The ‘unique standing considerations’ in the First Amendment context ‘tilt dramatically toward a finding of standing.’” *Tingley v. Ferguson*, 47 F.4th

1055, 1066-67 (9th Cir. 2022) (internal citations omitted). “The Supreme Court of the United States has explained that standing requirements are somewhat relaxed in First Amendment cases.” *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). “The First Amendment context creates unique interests that lead us to apply the standing requirements somewhat more leniently.” *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022).

The lower courts are similarly divided over the proper standard for evaluating the substantive injunctive relief factors in the context of First Amendment claims. *Winter* articulated the proper burden of proof at the injunctive relief stage: the moving party bears the burden of making a “clear showing.” *Winter*, 555 U.S. at 28. And, critically, the burden applies with full force to the first prong of *Winter*’s four-pronged test: “likelihood of success on the merits.” *Id.* at 25. Yet “the circuits’ varying formulations . . . are described differently, often reflecting pre-*Winter* formulations.” 13 Moore’s Federal Practice, Civil § 65.22.

The Fourth Circuit and Tenth Circuit properly apply the *Winter* factors. “The Supreme Court has held that the irreparable harm must be ‘likely,’ not merely possible.” *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 270 (4th Cir. 2018) (quoting *Winter*). “Under *Winter*’s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.” *Dine Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016).

The Ninth Circuit and several other courts of appeals misapply the *Winter* factors in evaluating First Amendment claims. The error stems from an incorrect interpretation of this Court’s holdings in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), and *Gonzales*

v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). As with the standing inquiry, these courts misread a rule about a particular subset of First Amendment cases as a rule that applies to all First Amendment cases. *Ashcroft* and *Gonzales* merely repeated the well-established rule that the party who bears the burden of persuasion at trial bears the burden of persuasion at the injunctive relief stage. In both of those cases, the government ultimately bore the burden at trial. *Ashcroft* concerned a facial challenge to a content-based restriction that triggered strict scrutiny, and *Gonzales* concerned a statute with a burden-shifting provision. Because the government bore the burden at trial in those cases, the movant did not need to make the customary showing that it was likely to succeed.

But several courts of appeals, including the Ninth Circuit, have read these precedents as holding that movants enjoy relaxed standards for obtaining injunctive relief in all First Amendment cases, not just the narrow category of cases in which the government would bear the burden at trial. *See, e.g., Doe v. Governor of Pa.*, 790 F. App'x 398, 403 (3d Cir. 2019) (“Because First Amendment cases require the government . . . to justify speech-regulating laws at trial, the burden also rests with the government at the preliminary injunction stage. So long as the plaintiff makes a colorable First Amendment claim, the government must justify its law”); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 962 (9th Cir. 2002) (“Under the law of the Ninth Circuit . . . when the harmed claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness.”). This diluted standard of “lesser meritoriousness” is the standard that the Ninth Circuit applied in the instant case: “[a] party seeking

preliminary injunctive relief in a First Amendment context can . . . merit the grant of relief by demonstrating the existence of a colorable First Amendment Claim.” 46 F.4th at 1098.

The Ninth Circuit’s decision should not stand. It rests on improper relaxation of the Article III standing requirements and the *Winter* factors. The application of these standards deepens a rift within the lower courts by conflicting with the standards of the D.C. Circuit, Second Circuit, Fourth Circuit, Fifth Circuit, and Tenth Circuit. Moreover, the standard applied by the Ninth Circuit cannot be reconciled with this Court’s decisions in *Clapper* and *Winter*. Finding standing based on hearsay evidence of a speculative injury is contrary to black-letter Article III principles. And allowing respondents to obtain injunctive relief based on the mere showing of a colorable claim flies in the face of *Winter*’s description of injunctive relief as an “extraordinary remedy.” 555 U.S. at 22. This issue implicates thousands of non-discrimination policies at the local, state, and federal level. Allowing the Ninth Circuit’s ruling to stand would enable any plaintiff who utters the words “First Amendment” to preemptively enjoin the enforcement of a non-discrimination policy. Further review is warranted.

A. Factual Background

This case arises out of a school district’s enforcement of a boilerplate non-discrimination policy. In May 2019, petitioner San Jose Unified School District (the “District”) found the chapter of the Fellowship of Christian Athletes (“FCA”) operating at one of District’s schools, Pioneer High School (“Pioneer”), to be in violation of the District’s non-discrimination policy. 46 F.4th at 1084. Petitioner consequently rescinded its recognition of FCA as an officially sponsored student club. *Id.*

The relevant non-discrimination policy stated:

All district programs and activities within a school under the jurisdiction of the superintendent of the school district shall be free from discrimination, including harassment, with respect to the actual or perceived ethnic group, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, and physical or mental disability, age or sexual orientation.

Id. at 1104.

Petitioner determined that FCA's bylaws conflicted with the non-discrimination policy. FCA required its student leaders to sign a pledge that said, in relevant part:

"[W]e believe that marriage is exclusively the union of one man and one woman" and "[t]he Bible is clear in teaching on sexual sin including sex outside of marriage and homosexual acts. Neither heterosexual sex outside of marriage nor any homosexual act constitute an alternative lifestyle acceptable to God."

Id. at 1082-83.

Petitioner's rescission of official recognition did not prevent FCA from continuing to operate. *See id.* at 1085. Rather, FCA was merely exempted from special benefits such as priority access to meeting space and access to school-provided bank accounts. *Id.* at 1089. Petitioner allowed FCA to continue operating on District campuses, and FCA continued to operate on District campuses during the 2019-20 school year, including at Pioneer. *Id.* at 1084.

Because of the COVID-19 pandemic, student clubs did not operate on District campuses between spring 2020 and April 2021. *Id.* at 1085. Still, Pioneer granted modified conditional approval to all student clubs,

including Pioneer FCA, for the 2020-21 school year. *Id.*

Prior to the 2021-22 school year, petitioner adopted a new non-discrimination policy known as the “all-comers policy.” *Id.* at 1087. Any club seeking official recognition was required to sign the all-comers policy. *Id.* The policy states that clubs must:

Allow any currently enrolled student of the school to participate in, become a member of, and seek or hold leadership positions in the organization, regardless of his or her status or beliefs.

Id.

Student clubs must reapply for official recognition each fall. *Id.* at 1082. FCA did not apply for official recognition during the 2021-22 school year. *Id.* at 1087. One of the clubs that did apply for recognition, the Senior Women Club, modified their copy of the “all-comers policy” before signing it to include a handwritten note stating that only “students who are seniors and identify as female” could become members. *Id.* at 1095. The Senior Women Club was granted recognition for the 2021-22 school year. *Id.*

Because student clubs must reapply for recognition each fall, FCA’s request for reinstatement is relevant only if an FCA student leader plans to apply for official recognition in the future. In September 2021, FCA’s Bay Area regional director, Rigoberto Lopez, stated that he knew of a student at Pioneer who planned to apply for the 2021-22 school year. *Id.* at 1090 (Christen, J., dissenting). But no student ultimately applied. *Id.* In May 2022, Lopez declared that he knew of other Pioneer students who planned to lead Pioneer FCA during the 2022-23 school year. *Id.* Lopez does not claim that any student has explicitly voiced an intention to apply for recognition, but Lopez predicts that students would apply if injunctive relief were granted. *Id.*

B. Procedural History

1. On April 22, 2020, FCA National filed suit against the District and several of its officials. *Id.* at 1106. It was later joined by Pioneer FCA. *Id.* at 1085. In the operative complaint, filed in July 2021, respondents alleged that the “all-comers policy” was both facially discriminatory and selectively enforced. *Id.* at 1087. Respondents alleged that petitioner violated their rights to: (1) equal access to extracurricular school clubs under the Equal Access Act (EAA), 20 U.S.C. §§ 4071 et seq.; (2) Free Speech, Expressive Association, and Free Exercise of Religion under the First Amendment; and (3) Equal Protection under the Fourteenth Amendment. *Id.* at 1085. Respondents sought damages and a preliminary injunction “requiring Defendants to restore recognition to student chapters affiliated” with FCA National, including Pioneer FCA, “as official[ly] approved student clubs.” *Id.* at 1086. The opinion of the Ninth Circuit concerned only the motion for a preliminary injunction.

The United States District Court for the Northern District of California denied respondents’ motion for a preliminary injunction. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 20-CV-02798, 2022 WL 1786574 (N.D. Cal. June 1, 2022). Judge Gilliam found that petitioner’s all-comers policy was facially neutral. *Id.* at 7. With regard to the selective enforcement allegation, Judge Gilliam held that respondents failed to prove that they were likely to succeed on the merits and thus were not entitled to a preliminary injunction. *Id.*

2. A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. 46 F.4th 1075. The majority opinion, written by Judge Lee and joined by Judge Forrest, directed the district court to enter an order reinstating FCA as an official student club. *Id.*

First, the majority found that respondents had established Article III standing. *See id.* at 1088-91. The majority arrived at this conclusion from the premise that the Article III standing inquiry is severely relaxed in the context of the First Amendment. The majority stated, “[w]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.” *Id.* at 1090. The majority found that Lopez’s predictions about Pioneer students’ intentions to apply for membership during the 2022-23 school year were sufficient to establish imminent injury, noting that “hearsay evidence may be considered when deciding whether to issue a preliminary injunction.” *Id.*

Second, the majority held that respondents had made the necessary showing on the merits. *See id.* at 1091-99. In evaluating the four injunctive relief factors, the majority again started from the premise that First Amendment claims should be held to a lesser standard. Whereas the typical applicant for injunctive relief must establish that its claim is “likely” to succeed, the majority stated that “a party seeking preliminary injunctive relief in a First Amendment context can . . . merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.” *Id.* at 1098.

Judge Christen dissented. In her view, respondents failed to establish Article III standing. *Id.* at 1103-1117. She stated, “[t]he unavoidable reality is that the District’s nondiscrimination policy will not harm FCA if no student intends to apply for [official] recognition.” *Id.* at 1103. Judge Christen remarked that the majority’s reliance upon Lopez’s hearsay predictions fell “woefully short” of the “concrete plans” and “firm intentions” standard this Court established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Summers v. Earth Island Inst.*, 555 U.S. 488

(2009). *Id.* at 1115. Judge Christen stated, “[t]he absence of a concrete plan or firm intentions to take action that will trigger the challenged conduct renders any future injury too speculative for Article III purposes.” *Id.* at 1113 (internal citation omitted).

REASONS FOR GRANTING THE PETITION

A. There Is Conflict Over Whether First Amendment Claims Must Satisfy The Ordinary Standing Requirements

The federal courts of appeals are divided over whether First Amendment claims must meet the traditional burdens of Article III standing. This disagreement reflects widespread confusion over the implications of this Court’s decisions in *Broadrick* and *Munson*. The split is mature and entrenched; every circuit has analyzed Article III standing requirements in the context of First Amendment claims for injunctive relief since *Clapper*. There is no reason to delay articulating the proper standard.

In the opinion below, the Ninth Circuit majority departed from normal Article III principles and applied a diluted standing test. The majority’s rationale for relaxing the Article III standing requirements was transparent: “[w]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.” 46 F.4th at 1090.

This approach was not an aberration. The Ninth Circuit regularly relaxes the Article III test when evaluating First Amendment claims. *See, e.g., Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010); *Tingley v. Ferguson*, 47 F.4th 1055, 1066-67 (9th Cir. 2022). The Fourth, Sixth, Eighth, and Tenth Circuits do the same. *See Edgar v. Haines*, 2 F.4th 298, 310 (4th Cir. 2021); *Faith Baptist*

Church v. Waterford Twp., 522 F. App'x 322, 330 (6th Cir. 2013); *Dakotans For Health v. Noem*, 52 F.4th 381, 384 (8th Cir. 2022); *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022).

Each of these courts has continued to apply a diluted Article III standard to First Amendment claims post-*Clapper*. *Clapper*, which addressed a First Amendment claim for prospective injunctive relief, should have resolved any confusion about whether a relaxed approach to First Amendment standing was proper: “[r]elaxation of standing requirements is directly related to the expansion of judicial power To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” 568 U.S. at 409 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). The Ninth Circuit and other lower courts are either overlooking *Clapper*’s articulation of the proper standard or are unable to reconcile *Clapper* with *Broadrick* and *Munson*.

Several lower courts have misinterpreted *Broadrick* and *Munson* as invitations to lessen the burden of Article III standing in the context of First Amendment claims. But the modified standing inquiry articulated in *Broadrick* and *Munson* applied only to prudential standing, not Article III standing. “This Court has relaxed the *prudential*-standing limitation when [particular] concerns are present In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.” *Munson*, 467 U.S. at 956 (emphasis added). Further, *Munson*’s articulation of a more lenient prudential standing

inquiry applied only to a particular subset of First Amendment claims—facial overbreadth challenges. “Application of the overbreadth doctrine is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort.” *Broadrick*, 413 U.S. at 613.

A misreading of *Munson* and *Broadrick* has infected several lower courts’ Article III standing doctrines. Critically, the confusion has undermined these courts’ application of the first Article III standing requirement: injury-in-fact. These courts have found speculative injury sufficient to satisfy the injury-in-fact requirement. “We have held that ‘a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury.’” *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (internal citation omitted). “The First Amendment standing inquiry is ‘lenient’ and ‘forgiving.’ This leniency ‘manifests itself most commonly in the doctrine’s first element: injury-in-fact.’” *SPC v. Thompson*, 992 F.3d 694, 699-700 (8th Cir. 2021) (internal citations omitted).

B. There Is Conflict Over Whether First Amendment Claims Must Meet The Ordinary Burden For Injunctive Relief

The federal courts of appeals are similarly at odds over whether First Amendment claims are categorically subject to a diluted application of the four *Winter* factors necessary to obtain injunctive relief. This disagreement is the product of confusion about this Court’s decisions in *Ashcroft* and *Gonzales*. Like the divide concerning Article III standing, this confusion has been percolating for over a decade.

In the opinion below, the Ninth Circuit moved First Amendment claims for injunctive relief onto their own island—one unencumbered by the traditional

burden of the *Winter* factors. Whereas *Winter* described injunctive relief as “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief,” 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (per curiam)), the opinion below stated, “a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.” 46 F.4th at 1098 (internal quotation marks and citation omitted).

The Ninth Circuit’s uneven application of *Winter* to First Amendment claims is replicated in other lower courts. The Third, Fifth, and Sixth Circuits have also endorsed a separate, less demanding standard for First Amendment claims. See *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017); *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013); *Cnty. Sec. Agency v. Ohio Dep’t of Comm.*, 296 F.3d 477, 485 (6th Cir. 2002).

The divide over the proper standard begins with confusion over which party bears the burden of persuasion. The ordinary rule is undisputed: the burden is on the movant. See *Mazurek*, 520 U.S. at 972 (1997) (citing C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, pp. 129-130 (2d ed. 1995)). But when the First Amendment is implicated, some lower courts stray off course. Under the well-established rule that “the burdens at the preliminary injunction stage track the burdens at trial,” *Gonzales*, 546 U.S. at 429, the government bears the burden of persuasion at the preliminary injunction stage for the narrow category of claims for which it would bear the burden at trial. In the First Amendment context, this includes claims that challenge content-based restrictions, see *Ashcroft*, and claims invoking

statutory provisions that shift the burden to the government, *see Gonzales*.

Some lower courts have misinterpreted these exceptions as a burden-shifting rule applicable to all First Amendment claims. The Third Circuit provides a clean summary of this mistaken approach: “[b]ecause First Amendment cases require the government—through either strict or intermediate scrutiny—to justify speech-regulating laws at trial, the burden also rests with the government at the preliminary injunction stage.” *Doe v. Governor of Pa.*, 790 F. App’x 398, 403 (3d Cir. 2019). But this approach flows from a patently false premise: not all First Amendment cases trigger strict or intermediate scrutiny. *See, e.g., Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010); *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

Though the Ninth Circuit has not explicitly endorsed the categorical burden-shifting approach of the Third Circuit, confusion over the burden of persuasion has colored its analysis of the proper burden of proof. In the First Amendment context, lower courts mangle the *Winter* inquiry in two different ways: 1) by applying a watered-down version of the four elements, *see Cal. Chamber of Comm. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022), or 2) by collapsing the four elements into one, *see Cnty. Sec. Agency*, 296 F.3d at 485. The Ninth Circuit’s substitution of the “colorable claim” standard, 46 F.4th at 1098, in place of *Winter*’s “likely to succeed on the merits” standard, 555 U.S. at 22, is a notable example.

C. The Ninth Circuit Is Wrong

The Ninth Circuit’s relaxed Article III standing inquiry contradicts this Court’s precedents. *Lujan* made clear that speculation about the intentions of

third parties is insufficient to establish Article III standing. And *Clapper* affirmed that *Lujan*'s prospective injury-in-fact standard applies with full force to First Amendment claims. "We have repeatedly reiterated that 'threatened injury must be *certainly* impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient. 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158).

In this case, the wrong approach led to the wrong result. Respondents' theory of Article III standing rests upon Lopez's hearsay prediction that Pioneer students will apply for recognition in the coming school year, even though no student applied for recognition during the previous school year. But the chain of events necessary to establish impending injury does not end there. Respondents bring a selective enforcement claim seeking *prospective* injunctive relief. A selective enforcement injury will occur in the future only if: 1) Pioneer FCA students apply for recognition; 2) Pioneer FCA is denied recognition; 3) other clubs that maintain discriminatory policies apply for recognition; and 4) those other clubs are granted recognition. In the words of *Clapper*, "[a] highly attenuated chain of possibilities . . . does not satisfy the requirement that threatened injury must be *certainly* impending." 568 U.S. at 410.

Respondents fall back on an alternative theory of organizational standing that fares no better. The Ninth Circuit majority held that FCA National possessed organizational standing because it "had to devote significant time and resources to assist its student members because of derecognition." 46 F.4th at 1089. But as Judge Christen's dissent points out, this theory of standing "conflates plaintiffs' claims for past and future injury." *Id.* at 1108. The only claims relevant to a motion seeking injunctive relief are those

implicating future injury. FCA National’s past expenses say nothing about future harm. Further, a preliminary injunction cannot be granted unless an applicant shows that an “irreparable” injury will result in the absence of such relief. 555 U.S. at 18. FCA National’s proffered injuries fail to satisfy this requirement. “Lost income or other economic loss that is calculable and compensable by monetary damages ordinarily will not be considered an irreparable injury.” 13 Moore’s Federal Practice, Civil § 65.22.

The Ninth Circuit’s relaxed application of *Winter*’s likelihood-of-success requirement similarly contravenes this Court’s guidance. This Court established that a party seeking a preliminary injunction must make a “clear showing” that it is entitled to relief. 555 U.S. at 22. Subsequent opinions should dispel any confusion over whether this standard applies to First Amendment claims. See *Ramirez v. Collier*, 142 S. Ct. 1264, 1275 (2022); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). A “clear showing” of the four *Winter* factors necessarily includes a clear showing that movant is likely to succeed on the merits. But the majority of the Ninth Circuit found that a “colorable claim” was a fine substitute for a “clear showing.” 46 F.4th at 1098. The Ninth Circuit’s approach cannot be reconciled with this Court’s view of injunctive relief as an “extraordinary remedy.” 555 U.S. at 22.

D. This Case Presents An Issue Of Exceptional Legal And Practical Importance

If the Ninth Circuit’s decision is allowed to stand, its fallout could not be contained. Non-discrimination policies are ubiquitous. There are nearly 100,000 public schools in the United States.¹

¹ NAT’L CTR. FOR EDUC. STATS., *Digest of Education Statistics*, <https://nces.ed.gov/fastfacts/display.asp?id=84> (last visited June 7, 2023).

California alone has 1,018 school districts.² The Ninth Circuit's standard encourages organizations from all over the country to sue to enjoin local school policies they dislike, no matter how tenuous the connection.

Civic institutions have come to rely on non-discrimination policies for a reason: this Court endorsed them. See *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (upholding a non-discrimination policy identical to the all-comers policy that respondents challenge). Turning a blind eye to the Ninth Circuit's injunction would usher in a new wave of challenges that call the stability of this Court's precedent into question.

Schools are not the only institutions that would bear the consequences of the Ninth Circuit's standard. Relaxing the requirements of Article III standing affects every First Amendment case or controversy brought before a federal court. The decision below sends a signal to prospective plaintiffs that the only requirement for obtaining an injunction is invoking the magic words "First Amendment." The Ninth Circuit's standard would turn Article III's case or controversy requirement into an empty formality.

² CAL. DEP'T OF EDUC., *Fingertip Facts on Education in California*, <https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp> (last updated Mar. 15, 2023).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK BOLEN
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Applicant Details

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Applicant Education

BA/BS From **Tulane University**
 Date of BA/BS **May 2019**
 JD/LLB From **Washington University School of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014
 Date of JD/LLB **May 13, 2024**
 Class Rank **Not yet ranked**
 Law Review/Journal **Yes**
 Journal(s) **Journal of Law & Policy**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Giles Rich Sutherland Moot Court**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at Washington University School of Law in St. Louis, and I am writing to apply for a clerkship in your chambers beginning in 2024. My prior professional experience combined with my natural curiosity and strong work ethic will enable me to contribute to the diverse range of cases before the court. In addition, as a first-generation law student, I believe a clerkship in your chambers will allow me to gain practical experience analyzing a wide range of legal issues and offer me the opportunity to further strengthen my research and writing skills while assisting in the mission of the court.

I became interested in a clerkship while working in Judge Noce's chambers in the fall of last year. While working in Judge Noce's chambers, I've drafted and edited opinions in a variety of areas ranging from habeas relief and social security appeals to Section 1983 claims and 12b(6) motions to dismiss. I've also assisted the Judge in preparing for hearings. Observing hearings as well as engaging in discussions with the Judge have strengthened my understanding of the litigation process and successful advocacy techniques. Additionally, I've had the opportunity to develop many of the core skills I believe are the basis of any successful legal work; research, analysis, writing, and communication. Not only did the experience sharpen my research and writing skills, but it also taught me to how to prioritize competing deadlines and projects without sacrificing excellent work product.

Enclosed, please find my resume, transcript, and writing sample. My writing sample is a memo and order I prepared during my externship with Judge David Noce. The following individuals are submitting letters of recommendation separately and welcome inquiries in the meantime:

Dean Russell Osgood
Washington University School of Law
rosgood@wustl.edu
(314) 935-4042

Professor Rebecca Hollander-Blumoff
Washington University
School of Law
rhollander@wustl.edu
(314) 935-6403

Professor Kevin Emerson Collins
Washington University
School of Law
kecollins@wustl.edu
(314) 935-6403

I am confident that my background, experience, and passion for service will help me aid your work and advance the mission of the court. Thank you for your consideration.

Sincerely,
Blaine Bonis

Blaine Bonis

1031 Highlands Plaza Dr. W Apt. #305, St. Louis, MO 63110 | b.blaine@wustl.edu | 225-333-6047

EDUCATION

Washington University School of Law	St. Louis, MO
<i>Juris Doctor Candidate</i> GPA: 3.57	May 2024
Honors & Activities:	<ul style="list-style-type: none"> Student Bar Association Representative Dean Student Advisory Council Scholar in Law Scholarship Award Staff Editor, Journal of Law & Policy 2022 Chief Sources Editor, Journal of Law & Policy 2023 Giles Sutherland Rich Memorial Moot Court Team
Tulane University	New Orleans, LA
<i>Bachelor of Science in Neuroscience and Music</i>	May 2019
Honors & Activities:	<ul style="list-style-type: none"> Orchestra, <i>1st Chair Bassist</i> Marching Band, <i>Drumline, Section Leader</i> Kappa Kappa Psi, <i>Vice President</i>

EXPERIENCE

Carl Zeiss AG	St. Louis, MO
<i>Summer Internship</i>	May 2023-August 2023
<ul style="list-style-type: none"> Assisted attorneys in patent research, prosecution, litigation, and filing, assisted in IP and trade secret legal issues and other in-house legal issues. Communicated with legal teams in different countries to coordinate filings and proceedings. 	
United States District Court Eastern District of Missouri - Judge David Noce	St. Louis, MO
<i>Extern</i>	August 2022-December 2022
<ul style="list-style-type: none"> Prepared and edited draft orders and opinions for the Judge on a variety of legal issues. Helped the Judge prepare for and assisted him during hearings. 	
Missouri State Public Defender System – Children’s Defense Team	St. Louis, MO
<i>Summer Internship</i>	May 2022-July 2022
<ul style="list-style-type: none"> Researched issues in client’s cases, analyzed and cataloged discovery materials, wrote memos and motions, assisted supervising attorneys in court and depositions, conducted client visits, met with experts and witnesses. 	
Ascension Parish Clerk of Court	Baton Rouge, LA
<i>Election Commissioner</i>	November 2020-April 2021
<ul style="list-style-type: none"> Ran voting center for over 1000 voters during state and federal elections Maintained voting records, informed voters of and protected their voting rights Enforced state health guidelines to protect voters and election officials from COVID-19 pandemic 	
Sole Proprietorship	New Orleans, LA
<i>In Person Assistant</i>	June 2019-December 2020
<ul style="list-style-type: none"> Worked one-on-one with individuals who have Alzheimer’s and other dementia-related diseases to adapt their lives to their condition, as well as supporting and assisting their families Created records to document their lives and assist and support their families 	
Green Waves Brass Band	New Orleans, LA
<i>Musician</i>	August 2015-May 2019
<ul style="list-style-type: none"> Learned large musical repertoire on a schedule Performed at events including Tulane football games, admissions events, weddings, and concerts. 	

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Record Of: **Bonis, Blaine**

Current Programs Of Study:

Student ID Number: 502379

JURIS DOCTOR

Transcript Issued 06/06/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (MOUL)	LAW	W74 500H	2.0	B
PROPERTY (D'ONFRO)	LAW	W74 507X	4.0	A-
TORTS (NORWOOD)	LAW	W74 515F	4.0	A-
CONSTITUTIONAL LAW I (OSGOOD)	LAW	W74 520C	4.0	A

Enrolled Units 14.0

Semester GPA 3.64

Cumulative Units 14.0

Cumulative GPA 3.64

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	HP
LEGAL PRACTICE II: ADVOCACY (MOUL)	LAW	W74 500J	2.0	B
CONTRACTS (SHILL)	LAW	W74 501K	4.0	A-
CRIMINAL LAW (DIAMANTIS)	LAW	W74 502U	4.0	B
NEGOTIATION (TOKARZ/SHIELDS)	LAW	W74 503G	1.0	CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0	B+

Enrolled Units 16.0

Semester GPA 3.43

Cumulative Units 30.0

Cumulative GPA 3.53

Fall Semester 2022

ELECTION LAW (LEVIN)	LAW	W74 529D	2.0	A-
INTERNATIONAL HUMAN RIGHTS LAW (SADAT)	LAW	W74 619C	3.0	B+
PATENT LAW	LAW	W74 623N	3.0	B+
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	B
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
JOURNAL OF LAW AND POLICY	LAW	W75 616S	1.0	CR

Enrolled Units 16.0

Semester GPA 3.40

Cumulative Units 46.0

Cumulative GPA 3.49

Spring Semester 2023

EVIDENCE (ROSEN)	LAW	W74 547K	3.0	A
LAW AND PSYCHOLOGY (HOLLANDER-BLUMOFF)	LAW	W74 550B	3.0	A-
LEGAL PROFESSION (JOY)	LAW	W74 563U	3.0	A
SPEECH, PRESS, & THE CONSTITUTION (MAGARIAN)	LAW	W74 609M	3.0	A
ADVANCED PATENT LAW (COLLINS)	LAW	W74 623K	3.0	A
INTELLECTUAL PROPERTY MOOT COURT TEAM - PATENTS AND COPYRIGHTS WHEELLOCK/COLLINS)	LAW	W75 606M	1.0	CR
JOURNAL OF LAW & POLICY	LAW	W75 616S	1.0	CR

Enrolled Units 17.0

Semester GPA 3.77

Cumulative Units 63.0

Cumulative GPA 3.57

Keri A. Disch, University Registrar

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Record Of: **Bonis, Blaine**

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Spring Semester 2023

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Washington University in St. Louis
SCHOOL OF LAW

May 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Blaine Bonis

Dear Judge Walker:

I am writing to recommend strongly Blaine Bonis, a rising third-year student at Washington University School of Law student, for a clerkship. I am the Dean and a Professor of Law here at Washington University School of Law. Before this, I was the President of Grinnell College (1998-2010) and, before that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School in Ithaca, New York.

I first got to know Blaine when I had him as a student in a large section of our introductory Constitutional Law course (structure and functions) in the fall of 2021. Blaine wrote a balanced, well-written, and substantive paper on the scope of First Amendment protection for students in public schools. In a class filled with very good students, Blaine stood out. He spoke up clearly and intelligently and then completed a solid final examination. He received a high A in the course.

Blaine is a fine student, and I expect that he will continue to be a strong performer through the end of his academic time here. Blaine serves on my Dean Student Advisory Committee (an advisory committee to the Dean on any topic the student members wish to raise). If you interview him, you will see he is a little quiet at first, but as time has passed, Blaine has proven to be a dynamic and frequent contributor to our academic and social life. Blaine's thoughtfulness, diligence, good spirit, and high intelligence will help him become a fine clerk. He interacts well with his colleagues and will do well with others in chambers. Finally, I want to add that he is an independent and creative thinker.

If you or anyone in your chambers would like to speak further about this excellent candidate, I am glad to do so (Cell: 641-821-3712).

Best,

/s/

Russell K. Osgood
Dean
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Russell Osgood - rosgood@wustl.edu

Washington University in St. Louis
SCHOOL OF LAW

June 9, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Blaine Bonis

Dear Judge Walker:

I am very glad to recommend Blaine Bonis for a clerkship in your Chambers. Blaine is an earnest, serious, and passionate student who I've been very lucky to teach in two different classes.

I initially met Blaine in my Federal Courts class in Fall 2022. As you know, Federal Courts is one of the most difficult in the law school curriculum. We cover complex topics including justiciability doctrine, federal court jurisdiction and the scope of Congress's control thereof, non-Article III courts, sovereign immunity, and more. Blaine sat in the front row and was a steady and reliable contributor to class discussion. His passion for the material and his clear grasp of the doctrine and its nuances made him a consistently welcome contributor who I got to know well despite the class size of 88 students. I enjoyed talking with him outside of class about important issues in the federal docket, and he had an impressive energy for law, legal doctrine, and legal issues that will clearly be an enormous asset to the profession. Blaine's ultimate grade on the anonymously graded exam, a B, was simply not reflective of the immense value and energy he brought to the class, and was likely a function of our very strict curve combined with the difficulty of the exam.

I was so glad to have Blaine in class again in the spring of 2023 in my Law & Psychology class. Blaine also sat up front in this class, and, out of 52 students, continued to be a stellar contributor who raised important, nuanced, and sophisticated points. In the class, we often discussed how psychological research might affect a wide variety of legal areas, and Blaine was a reliable source of connection with important doctrines outside of class coverage. His real-world knowledge of and interest in legal practice and doctrine were invaluable to our class discussion and I was grateful for his participation. On the final exam, Blaine earned a grade of A-, just shy of an A. He demonstrated strong writing skills and a thoughtful perspective on the issues of the course, as well as terrific preparation and knowledge of our course materials.

Blaine is a serious and passionate student whose work ethic, engagement, and determination will be an asset to your chambers. His terrific experience as an extern with a federal judge helps to demonstrate how successful he will be as a law clerk. He is truly a kind person whose commitment to the law and to justice are palpable. Students like Blaine make me feel positive about the future of legal practice in our country, and I am so glad to recommend him to you.

Best,

/s/

Rebecca Hollander-Blumoff
Vice Dean for Research and Faculty Development
Professor of Law

Washington University School of Law
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Rebecca Hollander-Blumoff - rhollander@wustl.edu - 314-935-6043

Washington University in St. Louis
SCHOOL OF LAW

April 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Blaine Bonis

Dear Judge Walker:

I write to recommend Blaine Bonis for a clerkship in your chambers. Blaine has a sharp and inquisitive mind that he wraps in a humble, deferential persona. I believe he will be a great asset to the judge who eventually hires him.

I only met Blaine at the beginning of this semester, but I have a clear picture of his abilities because I have worked quite intensively with him since then. He not only enrolled in my Advanced Patent Law course this semester, but he also earned a spot on the Washington University Giles Rich moot court team that I coach. Simply put, Blaine has excelled in both contexts.

Advanced Patent Law is a small course with under twenty students, and I run it like a seminar, engaging individual students in extended conversations to tease out concepts from the assigned reading. Blaine comes to class not only having done the reading but also, far more impressively, ready to discuss his interpretation of the reading. He has a small hitch in his speaking style that emerges from his desire to express himself carefully and in the clearest of possible terms. I often imagine the wheels turning in his head as he is speaking, and I appreciate the caliber of the facts that those wheels are able to marshal and the ideas they are able to generate. Just today in class, Blaine and I walked our way through the opinion from the Court of Appeals for the Federal Circuit in *Athena Diagnostics v. Mayo Collaborative Services*—one of the Federal Circuit's most controversial cases in the last five-or-so years. The case is a complex one to unpack: the denial of the petition for rehearing en banc spans thirty-five pages in the Federal Reporter and has no less than eight separate concurring and dissenting opinions. Yet, despite the difficulty of the task, Blaine demonstrated not only mastery of the case's actual facts and the court's actual legal reasoning, but also a nuanced understanding of both how different versions of the opinion might have employed other lines of legal reasoning and what the implications of those other lines of legal reasoning would have been. Blaine is the kind of law student whom I love to have in my classes because he enriches other law students' classroom experiences.

The Giles Rich moot court competition provided Blaine with an opportunity to spend several months drilling down into a single, unresolved patent law issue related to the enablement doctrine. Over a period of two months, I met with the moot court team twice a week during the early evenings to help the team members develop their arguments. We did this through mock oral arguments: team members would argue their cases, and I would ask critical questions designed to highlight any weaknesses that I saw in their arguments. Blaine may have felt a bit uncomfortable with this exercise at first as it forced him to articulate positions in public even though he had not yet thought them through in full, but he quickly warmed to it. He always invested time in considering the questions that I had asked in the previous practice session, and he regularly showed up at the next practice session ready to kick the tires on a reworked version of his argument. Blaine clearly understands how to take criticism and use it to strengthen his arguments.

In sum, I believe that Blaine offers the complete package that one could want in a clerk. He is a sharp, analytical thinker, he cares deeply about being a good communicator, and he has an affable personality—a combination of skills and attributes that I am sure will take him far. If I can offer any additional information on Blaine's candidacy, please do not hesitate to contact me.

Best,

/s/

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WRITING SAMPLE

The attached writing sample is a draft of a memo and order I prepared while externing in the chambers of the Honorable Judge David Noce in the Eastern District of Missouri. Judge Noce has permitted me to use this draft as a writing sample with party's names and case number redacted. In this case, after the death of her son in the city jail, Plaintiff KB sued the City, Mayor TJ, and Jail Commissioner JCA. The defendants filed a joint motion to dismiss under FRCP 12(b)(6).

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

B,)	
)	
Plaintiff,)	
)	
v.)	Cause No. x:xx-xx-xxxxxx-xxx
)	
CITY, <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

Before the Court is the joint motion of defendants City, TJ, and JCA to dismiss both counts of plaintiff's amended complaint (Doc. 16) under Federal Rule of Civil Procedure 12(b)(6). (Doc 19.)

For the reasons set forth below, defendants' joint motion to dismiss is granted. The parties have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c).

BACKGROUND

In her amended complaint, plaintiff KB alleges the following. On December 10, 2019, Decedent SEP was arrested and taken into custody at the city jail, operated by the defendant City through its Division of Corrections. Three days later, on December 13, 2019, at approximately 1:30 a.m., SEP was taken to the City University Hospital for severe dehydration. He was returned to the city jail at approximately 9:25 a.m. on December 14, 8 hours after he had been brought to the hospital. That evening, at approximately

6:00 p.m., SEP was found lying on the floor of his cell by city jail employee DT while she was conducting a cell check. DT called a nurse and her supervisors. SEP was pronounced dead when emergency medical services arrived at the scene. Plaintiff does not allege a cause of death.

Defendant TJ is the Mayor of the City and defendant JCA is the City Jail Commissioner. Plaintiff alleges the City, TJ, and JCA acted under the color of state law to deprive SEP of his federal constitutional rights under the Fourth and Eight Amendments, conspired to deprive him of those rights to impede and hinder the due course of justice, and caused his wrongful death. (Doc. 16. at 3.)

Plaintiff brings claims in two counts against the City, TJ, and JCA: the first count for wrongful death under Mo. Rev. Stat. § 537.080, with subject matter jurisdiction granted by 28 U.S.C. § 1367 and the second count for deprivation of federal rights under 42 U.S.C. § 1983 with subject matter jurisdiction granted by 28 U.S.C. §§ 1331 and 1343(a) (3).

DEFENDANTS' MOTION TO DISMISS

Defendants City, TJ, and JCA have moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). For a complaint to overcome a Rule 12(b)(6) motion to dismiss it "must include enough facts to state a claim to relief that is plausible on its face," with more than just labels and conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A sufficient complaint will "allow [] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and rise above mere speculation. *Twombly*, 550 U.S. at 555.

In reviewing pleadings under this standard, the Court must accept all the plaintiff's factual allegations as true and draw all inferences in the plaintiff's favor. *Retro Television Network, Inc. v. Liken Communications, LLC*, 696 F.3d 766, 768 (8th Cir. 2012). On the

other hand, the Court is not required to accept the legal conclusions the plaintiff draws from the alleged facts. *Id.* at 768-69. Furthermore, the Court “is not required to divine the litigant’s intent and create claims that are not clearly raised ... and it need not conjure up unpled allegations to save a complaint.” *Gregory v. Dillard’s, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (en banc).

Count 1 against defendant City

Defendant City, as a political subdivision of the state of Missouri, argues that it has sovereign immunity from plaintiff’s wrongful death claims under Missouri law because plaintiff has failed to plead any of the exceptions to sovereign immunity available under Mo Rev. Stat. §§ 537.600-537.610. A federal court looks to the law of the forum state in a wrongful death proceeding. *Andrews v. Neer*, 253 F.3d 1052, 1056 (8th Cir. 2001). The Missouri Supreme Court stated that sovereign immunity is:

“A judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that ‘the King can do no wrong,’ it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.”

Metro St. Louis Sewer District v. City of Bellefontaine Neighbors, 476 S.W.3d 913, 921 (Mo. banc 2016) (quoting Black’s Law Dictionary at 1396 (6th ed.1990)). “Missouri courts have recognized the common law rule of sovereign immunity since 1821. The rule is that the state, by reason of its sovereign immunity, is immune from suit and cannot be sued in its own courts without its consent [or] a waiver by the state.” *Metro*, 476 S.W.3d at 921.

As sovereign immunity is the default rule in the state of Missouri, a plaintiff must plead an explicit exception to it. *Epps v. City of Pine Lawn*, 353 F.3d 588, 593-94 (8th Cir. 2003). These exceptions are codified in Mo. Rev. Stat. §§ 537.600-537.610. To fall

under the exceptions in § 537.610, a plaintiff must “specifically plead facts demonstrating that the claim is within this exception to sovereign immunity.” *Epps*, 353 F.3d at 594. Courts must strictly construe any statutory provisions that waive sovereign immunity. *Metro*, 476

S.W.3d at 92. As such, courts “cannot read into the statute an exception to sovereign immunity or imply waivers not explicitly created in the statute.” *Id.* at 921.

In her second amended complaint, plaintiff fails to allege any exception to the sovereign immunity doctrine. However, in her memorandum in response to the motion to dismiss plaintiff attempts to raise an argument that the City falls under the exceptions set out in § 537.610.1 because it is self-insured through the Public Facilities Protection Corporation.¹ (Doc. 27 at 3). “Section 537.610 allows an entity protected by sovereign immunity to waive that immunity by either purchasing insurance or by adopting a self-insurance plan for those claims.” *Hendrix v. City of St. Louis*, 636 S.W.3d 889, 900 (Mo. Ct. App. 2021). Plaintiff argues that the City is insured or self-insured through the Public Facilities Protection Corporation (“PFPC”). (Doc. 27 at 3).

In addressing a motion to dismiss, “[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.” *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011). Plaintiff’s memo in response to the motion to dismiss does not fall into these categories. To overcome the default rule of sovereign immunity, plaintiff must plead facts in her complaint to establish an exception. Plaintiff has failed to allege an exception to the defense of sovereign immunity in her complaint. Earlier cases, *see* footnote 1 below, indicate that

¹ In *Torres v. City of St. Louis*, the Eighth Circuit Court of Appeals, invoking the ruling of the Missouri Court of Appeals in *Hendrix v. City of St. Louis*, 636 S.W.3d 889, 900-01 (Mo. Ct. App. 2021), concluded that the City of St. Louis is not self-insured through the PFPC for negligent supervision or training claims and thus had not waived sovereign immunity for such claims. 39 F.4th 494, 509-10 (8th Cir. 2022).

the City is not self-insured by the PFPC. The Court will allow plaintiff the opportunity to plead an exception to sovereign immunity.

The Court grants the motion to dismiss Count 1 against defendant City without prejudice.

Count 2 against defendant City

Defendant City argues that plaintiff's 42 U.S.C. § 1983 claim must be dismissed for failure to state a claim under *Monell v. Dep't. of Soc. Serv. of City of New York*, 436 U.S. 658, 690 (1978). In addition, the City argues that plaintiff failed to allege facts that establish individual liability for any municipal employee and plausibly indicate but-for causation between defendant City and the death of SP.

Monell provides two routes to hold a municipality liable. The plaintiff may show that his or her constitutional rights were violated by "action pursuant to official municipal policy" or as a result of misconduct by non-policy making employees so pervasive "as to constitute a 'custom or usage' with the force of law." *Monell*, 436 U.S. at 691. To demonstrate a custom requires the claim allege facts that plausibly indicate that (1) plaintiff suffered injury due to a continuing, widespread, persistent pattern of unconstitutional conduct by the governmental entity's employees or officials; (2) that there was deliberate indifference to or tacit authorization of said conduct by policymaking officials after notice of misconduct; and (3) that the moving force behind the constitutional violation was the defendant's custom. *Ware v. Jackson Cty.*, 150 F.3d 873, 880 (8th Cir. 1998).

A persistent pattern of unconstitutional conduct requires more than a single instance or isolated instances of wrongdoing. *Harris v. City of Pagedale*, 821 F.2d 499, 508 (8th Cir. 1987). Here, plaintiff alleges that SEP's death was the result of the actions and policy choices of the City and its officers, TJ and JCA. Plaintiff alleges that TJ and JCA established the policies covering the training, supervision, direction and control of the City jail and the personnel working there. (Doc. 16 at ¶ 9.) She further alleges that the City's employee training practices are inadequate. (Doc. 16 at ¶ 10.) Specifically, plaintiff

alleges the City failed to train employees to “treat inmates suffering from obvious medical conditions noticeable to the ordinary person” as well as failing to train them to “recognize and monitor medical emergencies relating to the inmates in their care, by delay or non-response to both urgent and debilitating conditions.” (Doc. 16 at ¶ 19.)

Monell claims based on a failure to train must pass a higher bar than other *Monell* claims. *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (“A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.”) To clear this bar, the plaintiff must show that employees acted with deliberate indifference. *Id.* “[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” *Id.* (citing *Bd. of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997)).

In her second amended complaint, Plaintiff fails to allege how these failures to train employees resulted in the constitutional violation of SEP’s rights or that any particular employee acted in a manner pursuant to these customs that resulted in his death. Without alleging that a particular actor had knowledge of the conditions that posed an excessive risk to SEP’s health and did not act on them, plaintiff cannot show that defendants acted with deliberate indifference. *Dulany v. Caranhan*, 132 F.3d 1234, 1239 (8th Cir. 1997).

Plaintiff alleges that the defendants had notice of misconduct based on deaths of ten inmates at the City jail and of seven inmates at the separate City workhouse facility over the ten years preceding SEP’s death amounting to a conscious disregard and a deliberate indifference. Plaintiff fails to allege any specific underlying unconstitutional conduct that led to SEP’s death and relate it to with any of the other deaths at the City jail that she alleges put defendants on notice of a persistent pattern to which they were deliberately indifferent. She does not allege any facts such as common circumstances, conditions, unconstitutional conduct, policies, or actors that allow the Court to reasonably infer that the string of deaths constituted a pattern that put officials like TJ and JCA on notice.

With no common information beyond the shared location, a relevant pattern cannot be found. Plaintiff does not plausibly allege that those deaths were the result of the same specifically alleged and described custom and policy that led to SEP's death. Thus, plaintiff's *Monell* claim is legally insufficient.

While plaintiff "need not specifically plead the unconstitutional policy or incorporate the policy's specific language into [her] complaint," plaintiff "must include allegations, references, or language by which one could begin to draw the inference that the conduct of which [she] complains was the result of an unconstitutional policy or custom." *McKay v. City of St. Louis*, 4:15-CV-01315-JAR, 2016 WL 4594142, at *5 (E.D. Mo. Sept. 2, 2016). No such inference can be drawn here as plaintiff fails to allege facts that allow the Court to draw a connection between the deaths. Plaintiff's allegations fail to satisfy the pleading standards set out in *Twombly* and *Iqbal*. A claim is not sufficient if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557.)

Similarly, plaintiff's allegations fail to show that a government policy was the moving force behind the death of SEP. Plaintiff fails to allege what government actors were involved and what their specific actions were that led to his death. Without more specific factual allegations on the cause of SEP's death and the actions that government actors took or did not take that hastened that injury, plaintiff's current complaint fails to show that the government was the moving force behind the injury.

Plaintiff argues that she does not need to specifically plead the alleged unconstitutional policy or incorporate its specific language, citing *McKay*. There the court stated, "While a § 1983 plaintiff must include allegations, references, or language by which one could begin to draw the inference that the conduct of which he complains was the result of an unconstitutional policy or custom, [she] need not specifically plead the unconstitutional policy or incorporate the policy's specific language into [her] complaint." *Id.* (citing *Crumpley-Patterson v. Trinity Lutheran Hosp.*, 388 F.3d 588, 591 (8th Cir. 2004)).

Plaintiffs may proceed to discovery to search for the existence of the required custom or policy if they “allege facts which would support the existence of an unconstitutional policy or custom.” *Doe v. School District of City of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003). Plaintiff’s current allegations are not sufficient to support the existence of an unconstitutional policy. The claim lacks facts to support a pattern of unconstitutional behavior, to show a deliberate indifference, or to show that a government custom was the moving force behind the injury that occurred.

The Court grants the motion to dismiss Count 2 against defendant City.

Dismissal of Count 2 against defendant City with prejudice

Defendant asks that Count 2 be dismissed with prejudice. (Doc 28. at 5). It is within the Court’s discretion to dismiss a pleading for failure to state a claim with or without prejudice. *Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012). Leave to amend a complaint should be freely given to promote justice. Fed. R. Civ. P. 15(a). “We generally prefer to decide claims on their merits instead of on their pleadings.” *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 409 (8th Cir. 1999). Nevertheless, dismissal with prejudice may be warranted if an amended pleading would still be futile. *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009). A dismissal with prejudice is also appropriate when a plaintiff has shown “persistent pleading failures” despite receiving the opportunity to amend their pleading. *Michaelis v. Neb. State Bar Ass’n*, 717 F.2d 437, 438–39 (8th Cir. 1983); *see also Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751, 758 (8th Cir. 2021) (ruling dismissal with prejudice was proper because plaintiff was unable to plead “adequate claims” despite multiple attempts to do so).

This action commenced on March 9, 2022, with two plaintiffs, the current plaintiff KB and SMP, and one defendant, the City. The plaintiffs alleged two claims, one for negligent wrongful death under Missouri state law and one for violation of 42 U.S.C. § 1983. On May 9, 2022, defendant City moved to dismiss SMP for lack of standing to sue. (Doc.

8.) In a supporting memorandum, the City argued SMP lacked standing. The City also argued that the complaint failed to alleged how SEP died, failed to allege how any City employee was involved in SEP's death, and what policy or policies of the City were violated that led to SEP's death. (Doc. 9 at 1.)

Plaintiff's response to this first motion to dismiss and supporting memorandum was to file an amended complaint on May 25, 2022. (Doc. 10). The amended complaint dropped SMP as a plaintiff and added defendant TJ, the current Mayor of the City, and JCA, the current Commissioner of the City Jail. In all other substantive matters, the amended complaint duplicated the allegations of the original complaint. (Doc. 10).

On June 2, 2022, the Rule 16 scheduling conference was held, a case management order was filed, the first motion to dismiss was denied as moot, and plaintiff filed the current amended complaint.

Regardless of whether it remains possible for plaintiff to discover a pattern of unconstitutional acts from the prior inmate deaths in the ten years that preceded SEP's death, that pattern must also be alleged to have resulted in the unconstitutional acts that led to SEP's death. It has been over two years since SEP's death and in multiple complaints plaintiff does not allege the immediate factual cause of his death, a fact necessary to connect any pattern to SEP's death. Granting more time to allege the cause of his death, regardless of whether it resulted from an unconstitutional pattern or policy would be futile. Therefore, the Court dismisses plaintiff's § 1983 claim against the defendant City with prejudice.

Counts 1 and 2 against defendants TJ and JCA

Plaintiff also brings claims against defendant TJ and defendant JCA along with her claims against the City. Plaintiff does not state the capacity in which she is suing defen-

dants TJ and JCA.² “If a plaintiff’s complaint is silent about the capacity in which she is suing the defendant, we interpret the complaint as including only official-capacity claims.” *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619 (8th Cir. 2007). A suit against a government officer, like defendants TJ and JCA, in their official capacity “is functionally equivalent to a suit against the employing governmental entity.” *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010). “It is proper for a court to dismiss a claim against a government officer in [her] official capacity as duplicative or redundant if the claims are also asserted against the officer’s governmental employer.” *Caruso v. City of St. Louis*, 4:16 CV 1335 RWS, 2016 WL 6563472, at *1 (E.D. Mo. Nov. 4, 2016). As there is no difference between the claims asserted against the City and its officers TJ and JCA, claims against defendants TJ and JCA are redundant and duplicative.

The Court grants the motion to dismiss Counts 1 and 2 against defendants TJ and JCA with prejudice.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that the defendants’ motion to dismiss the complaint (Doc. 19) **is granted** as follows: Count 1 against the defendant City is dismissed without prejudice to plaintiff filing an amended complaint within 30 days of this date to allege facts that indicate a specific exception to the sovereign immunity defense; Count 2 is dismissed against the defendant City with prejudice; and Counts 1 and 2 are dismissed with prejudice against defendants TJ and JCA.

² The Court takes judicial notice of the fact that neither Mayor TJ or Commissioner JCA were acting in their current positions at the time of SEP’s death. LK was the Mayor of City and DG was the Commissioner of Corrections at the time of SEP’s death.

Applicant Details

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Bar Admission